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ABSTRACT

This report examines the policies and practices of the Department of Education's Office of Civil Rights (OCR) for determining whether school systems are providing appropriate educational services to language minority students who are learning English as a Second Language (ESL). Data are drawn from OCR documents in the public domain, including approximately 160 compliance letters sent to school districts in 1996 and 1997. Each of these letters gave OCR's determinations pursuant to on-site investigations of the schools' programs for ESL students and carried an attached "corrective action" agreement from the school systems. It is argued that OCR has, in the absence of critical scrutiny within the government, imposed on schools an ever-expanding burden of requirements with dubious justification. Under the mantle of defending the civil rights of English language learners, OCR staff are in classrooms, looking over teachers' shoulders, second-guessing teachers and administrators, judging the quality of instructional programs and materials, and generally being educationally intrusive in ways never contemplated by the drafters of the civil rights statutes. It is concluded that there is ample evidence in the letters reviewed to demand substantial changes in how OCR operates. (MSE)

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CEO POLICY BRIEF

November 1998

FEDERAL CONTROL OUT OF CONTROL:

The Office for Civil Rights' Hidden Policies on Bilingual Education

by Jim Littlejohn *

INTRODUCTION

In the U.S. Department of Education, the Office for Civil Rights (OCR) is responsible for ensuring that school systems do not engage in discriminatory actions that violate Title VI of the Civil Rights Act of 1964.1 The findings of this report raise questions that go to the heart of OCR's role and function as an enforcement agency. Setting aside its obligations to the public it is sworn to serve, OCR pursues its own agenda and oversteps its Congressional mandate. Instead of providing leadership for educational institutions through clear enunciation of national policy and forthright findings of fact, OCR officials practice double-speak to justify unwarranted interference in local educational decision-making. This secret sub-regulating, pursuant to un-promulgated policies should be of concern to all.

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This report examines OCR's current policies and practices for determining whether school systems are providing appropriate educational services to national-origin minority students who are English language learners. The information in this report is taken from OCR documents in the public domain, including approximately 160 compliance letters OCR sent to school systems in 1996 and 1997. Each of these letters gave OCR's determinations pursuant to on-site investigations of the schools' programs for

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English language learners and carried an attached "corrective action" agreement from the school systems.

Historically, OCR has been cut a lot of slack by Congress and the Executive Branch because it does civil rights work. Any attack on OCR as being excessive in its enforcement zeal is deflected back to the attacker with the label of being anti—civil rights or racist. In the absence of critical scrutiny, the agency has imposed upon schools an ever-expanding burden of requirements with dubious justification. Under the mantle of defending the civil rights of English language learners, OCR staff are in and out of classrooms, looking over teachers' shoulders, second-guessing teachers and administrators, judging the quality of instructional programs and materials, and generally being educationally intrusive in ways never contemplated by the drafters of the civil rights statutes. There is ample evidence in the letters reviewed in this report to demand substantial changes in how OCR does business.

LEGAL AND POLICY BACKGROUND

Title VI and the May 25th Memorandum

Congress established OCR in the mid-1960s as part of the federal effort to desegregate southern school systems pursuant to Title VI of the Civil Rights Act of 1964. In the early1970s, OCR, then part of the former Department of Health, Education, and Welfare (HEW), expanded its enforcement activities under Title VI to include ensuring equal educational opportunities for national origin minority students who are limited-English speaking (LES).

There is no specific reference in the Title VI statute or regulations pertaining to requirements for teaching English language learners. However, on May 25, 1970, HEW published in the Federal Register a Title VI policy memorandum, *Identification of Discrimination and Denial of Services on the Basis of National Origin*, that expanded upon Title VI regulations by stating general requirements for school systems enrolling national-origin minority LES students. According to the May 1970 memorandum:

Where inability to speak and understand the English language excludes such [national origin] students from effective participation in a district's educational program, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

Between 1970 and 1974, OCR staff used the May 1970 memorandum as a general guide to measure Title VI compliance. A number of school systems were found in violation of Title VI, and were encouraged to remedy the violation by developing compliance plans that included bilingual education.

Lau v. Nichols Decision

The U.S. Supreme Court Decision in Lau v. Nichols, 414 U.S. 563 (1974) reviewed and affirmed the May 1970 memorandum as a reasonable interpretation of Title VI requirements. This provided judicial support for federal oversight of school districts' practices regarding educational opportunities for English language learners. In part, the opinion stated:

. . . there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum, for students who do not understand English are effectively foreclosed from any meaningful education. (Lau at p. 566)

Neither the May 1970 memorandum nor the Lau decision set forth specific requirements for districts to follow in providing these students equal educational opportunity. The issue presented to the Court emphasized correcting deficiencies in the English language, not establishing separate curricula and staff in languages other than English.**2** In fact, the Court explicitly avoided favoring one approach over another by stating:

No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others. (Lau at p. 565)

The *Lau Remedies*

OCR seized upon the favorable Supreme Court decision and embarked upon renewed enforcement efforts. In late 1974, the agency brought together a panel of educational experts who strongly favored bilingual education to develop OCR's guidelines for obtaining acceptable compliance plans from school systems. In the summer of 1975, OCR distributed to its regional offices the *Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under Lau v. Nichols*. Copies were also sent to state education agencies, but

without any opportunity for the states, the school districts regulated by OCR, or the public at large to comment or suggest modifications. Thus, by agency fiat, the "*Lau Remedies*" required bilingual education at the elementary and middle school levels for national-origin minority students who were dominant speakers of a language other than English.

The educational and legal theory supporting bilingual education was that students who were dominant in a language other than English should be taught in that language, thereby ensuring them equal access to academic subjects while they were learning English.**3** A corollary argument was that students who primarily speak a non-English language should learn to read initially in that language, on the assumption that reading is a skill that can be easily transferred to a second language. Researchers have raised serious questions about these theories; for example, the 1997 National Research Council study *Improving Schooling for Language-Minority Children, A Research Agenda* found no evidence to support the position that learning to read in the primary language facilitates learning to read in English. Also, the lack of staff and curriculum materials in languages other than English represent overwhelming obstacles to implementing bilingual programs.

Following its issuance of the *Lau Remedies*, OCR used its national data base to identify approximately 500 school systems that had large numbers of English language learners who were not being provided either bilingual education or English as a Second Language (ESL) programs. From 1975 to 1980, disregarding practical considerations and the lack of supporting research data, OCR negotiated bilingual education plans with virtually all of these targeted school systems. Several other school systems that applied for Emergency School Aid Act funds also came under OCR's scrutiny, and were required to adopt bilingual education programs as a condition for receiving new federal funds. OCR never defined the standards for establishing a Title VI violation, and the *Lau Remedies* soon became the de facto compliance standards.

Opposition to the Lau Remedies

Many school officials strongly objected to the bilingual education requirement, but few were willing to challenge OCR's interpretations. It is easier to accept a federally-sanctioned program

than to defend another, and most state education agencies offered little support or guidance.

Two notable exceptions were the Fairfax County, Virginia, Public Schools, and the State of Alaska. In the 1970s, the Fairfax County Public Schools, located in Northern Virginia, enrolled thousands of English language learners representing more than 50 different language groups (today the number is over 100). To teach English effectively to such a large variety of language-minority students, the district adopted an ESL approach, using bilingual teachers and community members to assist as interpreters for parents. By all objective standards, the district's program was well-run and effective; OCR did not agree. Throughout the Carter administration, OCR descended upon the district numerous times with investigators, lawyers, and assorted Washington bureaucrats in a concerted effort to move the district from its ESL program to the bilingual education model. The agency never succeeded. Finally, a few weeks after Ronald Reagan was elected President in 1980, OCR's holdover political leadership grudgingly issued a letter to Fairfax finding the district's ESL program in compliance with Title VI because it was deemed to be "equally effective" as bilingual education programs.

During the four years of the Carter administration, OCR's zeal for bilingual education sometimes reached absurd results and ultimately led to serious public errors by the agency—and a disastrous beginning for the newly-formed U.S. Department of Education. After OCR visited several remote villages in Alaska, it demanded that the schools teach in the native Alaskan languages and dialects. Undeterred by the fact that such languages were not written down, OCR ordered the school systems to *develop* written languages to carry out the required bilingual instruction. The State of Alaska sued OCR in the case Northwest Arctic v. Califano, arguing that the *Lau Remedies* were not legal guidelines and that the agency was exceeding its legal authority by requiring bilingual education. In 1979, OCR's lawyers convinced the HEW leadership to settle the case with a promise that OCR would publish the *Lau Remedies* or similar guidelines in the Federal Register for public review and comments, and ultimately issue them as new Title VI regulations. It never did.

The Language Minority NPRM

The effort to publish the *Lau Remedies* soon became enmeshed in presidential election politics. In May 1980, the Carter administration disbanded HEW and created the new U.S.

Departments of Health and Human Services, and of Education. By June 1980, OCR's leadership, with support from the White House, convinced Shirley Hufstedler, the first Secretary of Education, that a Title VI regulation requiring bilingual education should be issued before the election to gain Hispanic support for the Democratic ticket, especially in the populous states of Texas and California. This turned out to be a major fiasco. On August 5, 1980, Secretary Hufstedler published in the Federal Register a Notice of Proposed Rulemaking (NPRM), titled *Nondiscrimination Under Programs Receiving Federal Financial Assistance Through the Department of Education, Effectuation of Title VI of the Civil Rights Act of 1964*. This document, dubbed the *Language Minority NPRM*, required virtually every school system that enrolled English language learners to establish bilingual education programs in grades K-12.

The *Language Minority NPRM* had been written in secret by a small number of OCR staff who had no background in the education of English language learners, and little common sense. Some OCR staff had strong misgivings about a federal requirement for bilingual education, particularly after observing the consistent success of Vietnamese immigrants who came to this country in large numbers during the late 1970s, when only ESL or other English language instruction was available. There were also serious practical problems involved in offering bilingual education in many languages.

As reflected in the more than 5,000 public comments the agency received, opposition to the proposed bilingual requirements was overwhelming and widespread. The National Education Association was one of the few national organizations that supported the proposal. By late fall 1980, Congress considered amending the Title VI regulations to prevent OCR from conducting investigations on issues related to English language learners. The matter was resolved in February 1981, when the Reagan administration withdrew the NPRM from further consideration. In announcing the withdrawal, the newly appointed Secretary of Education, Terrell Bell, cited the proposed regulation as "overly prescriptive and burdensome."

Current Policies

OCR currently relies on three policy documents to interpret Title VI requirements regarding equal educational opportunities for English language learners. These are: (1) The May 25, 1970

memorandum; (2) a December 3, 1985 document entitled *OCR's Title VI Language Minority Compliance Procedures*; and (3) a September 27, 1991 *Policy Update on Schools' Obligations toward National Origin Minority Students with Limited-English Proficiency (LEP Students)*. As discussed above, the May 25 Memorandum provided only general guidance for school systems. The remaining two documents were issued by OCR to clarify the requirements of the May 25 Memorandum and remove the restrictions imposed by the *Lau Remedies*.

The December 1985 Policy

The December 1985 policy was developed because then-Secretary William Bennett became aware that the more than 500 bilingual plans OCR had negotiated with school systems from 1976 to 1980 were still in effect. His staff directed OCR to inform each of the 500-plus school systems that they no longer had to follow these *Lau Remedies* plans. The notice to the schools included the newly-drafted guidance, which emphasized a more flexible approach to programs for LEP students.

The 1985 policy, which OCR acknowledges is still in effect, set forth three key elements. The first clarifies under what circumstances school systems are required to submit compliance agreements or corrective action plans to OCR regarding deficiencies in programs for English language learners:

Although the May 25th Memorandum and the Lau v. Nichols decision require school districts to "take affirmative steps" to open their instructional programs to language minority students, ***OCR does not require the submission of a written compliance agreement (plan) unless a violation of Title VI has been established.*** *(p. 2)* (emphasis added)

The second element defines which students are covered by the May 25, 1970 Title VI guideline:

The affirmative steps required by the May 25th Memorandum have been interpreted to apply to national-origin minority students who are learning English as a second language, or whose ability to learn English has been substantially diminished through lack of exposure to the language. ***The May 25th Memorandum does not generally cover national-origin minority students whose only language is English, and who may be in difficulty academically,***

or who have language skills that are less than adequate. *(p. 2)* (emphasis added)

Finally, the 1985 policy guidance emphasizes OCR's post-*Lau Remedies* policy of providing substantial flexibility to school systems in choosing programs for English language learners:

In providing educational services to language minority students, school districts may use any method or program that has proven successful, or may implement any sound educational program that promises to be successful. *Districts are expected to carry out their programs, evaluate the results to make sure the programs are working as anticipated, and modify programs that do not meet these expectations. (p. 3)* (emphasis added)

The September 1991 Policy

OCR's most recent policy update was developed during the middle of the Bush administration to update the legal foundation for OCR policy and to clarify issues related to staff requirements, criteria for exiting students from alternative language programs and evaluating programs for English language learners. In a memorandum dated September 27, 1991, Michael L. Williams, then Assistant Secretary for Civil Rights, clarified the policy guidance as follows:

The policy update adheres to OCR's past determination that Title VI does not mandate any particular program of instruction for LEP students . . . This document should be read in conjunction with the December 3, 1985, guidance entitled, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures," and the May 1970 memorandum to school districts entitled, "Identification of Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11595 (May 1970 Memorandum). It does not supersede either document . . . .

In the September 1991 policy, OCR adopted the standards applied in the 5th Circuit decision in Castañeda v. Pickard to determine whether school systems were in compliance with Title VI. Under these standards, a program for English language learners is acceptable if:

1. The district is pursuing a program informed by an educational theory recognized as sound by some experts in the field, or at least deemed a legitimate experimental strategy;

2. the programs and practices actually used by the district are reasonably calculated to implement effectively the educational theory adopted by the District; and

3. the district has taken action if the program, after a legitimate trial, fails to produce results indicating that the language barriers confronting students are actually being overcome.

The document also posited that the success of a program for LEP students would be determined by their eventual ability "to participate meaningfully in the recipient's programs." In other words, *meaningful participation would be a result of the school system's program for LEP students*. (1991 Policy, p. 9) In recent years, OCR has stood this principle on its head, requiring meaningful participation by LEP students upon their entry into the school system. This twisted reading was contrived to support bilingual education programs over English immersion programs, since, according to bilingual advocates, an LEP student could enjoy "meaningful participation" only if classroom instruction is in the dominant language. OCR now consistently uses "meaningful participation" instead of "English language development" as the principal requirement in determining the compliance of a school's program.

This perspective drives OCR's compliance investigations and policy interpretations on the issue of educating English language learners. ESL and other English language programs meet the requirements of the law, but inevitably fall short under OCR's distortion of the legal standard. School systems that implement English language programs for LEP students are always suspect in OCR's eyes, and must meet increasingly closer agency scrutiny and ever higher standards. School systems that attempt to implement bilingual education programs face everywhere the lack of teachers and curriculum materials, and thus also fall short under OCR's perverse measures, because they are unable to provide bilingual instruction to all LEP students and in every language.

The Policy That Never Existed

Since 1991, OCR has issued no further policy updates or clarifications to either its staff or school systems regarding its standards for determining compliance with Title VI on this issue. In 1993, President Clinton appointed Norma Cantú, an attorney for the Mexican American Legal Defense Fund (MALDEF) and

bilingual education advocate from Texas, to head the Office for Civil Rights. In 1994, Ms. Cantú established an internal task force to prepare a new "Lau" policy for OCR. The task force met for several months, and eventually prepared a draft policy that strongly favored bilingual education.4 However, Assistant Secretary Cantú was unable to obtain approval for the new policy within the Department. Undersecretary Mike Smith remembered too well the debacle of the 1980 OCR *Language Minority NPRM* and was not about to let OCR take the Department down that road again. Faced with this lack of support, the Assistant Secretary told OCR task force members that the aborted "Lau" policy "does not exist."

OLD POLICY, NEW REQUIREMENTS

Case-by-Case Strategy

Deprived of departmental support for its favored policy, OCR's leadership has adopted a case-by-case, state-by-state strategy to interpret the 1985 and 1991 policies in ways that dictate educational procedures and support bilingual education programs wherever possible.

The San Francisco, Dallas, and Denver regional offices, which serve states with laws that support bilingual education, are prime arenas for the promotion of OCR's agenda. In 1995, OCR's Denver staff helped bilingual advocates negotiate a strong bilingual education plan with the State of Colorado. In 1996, Assistant Secretary Cantú appointed a bilingual advocate as Director of the San Francisco regional office. She also directed a Denver OCR staff attorney, who strongly favors bilingual education and a highly prescriptive enforcement approach, to essentially take over the Dallas regional office "Lau" compliance review program. As a result, "Lau" investigations in Texas over the past two to three years have become predictably inflexible in support of bilingual education programs.

Among the documents reviewed for this report, there were very few copies of the final plans submitted by the school districts, and no record of the many meetings and negotiations with OCR staff that led up to the final plans. Regional offices that strongly favor bilingual education often use negotiating or "technical assistance" sessions to convince school systems that bilingual education is the instructional method they should "choose." For example, the

Denver office has developed the practice of accepting from school systems generic agreements regarding the types of educational programs the district will implement. Staff then work with school officials over the telephone and on-site to move them toward more prescriptive programs, including bilingual education programs.

OCR's Recent Expansion of Requirements

Over the past few years, OCR has quietly expanded upon the 1970, 1985, and 1991 interpretations of law and policy to the point where virtually any school system in the nation, even one with top-rated programs for LEP students, would be found deficient by OCR staff.**5** The several thousand pages of OCR documents reviewed in compiling this report involve approximately 160 school districts from Massachusetts to California, all of which were found to be out of compliance with the law when judged by OCR's newly expanded (and never publicized) standards for adequate LEP programs. Every district reviewed by OCR during the period covered by this report was required to submit to OCR a "voluntary compliance plan" (statement of actions to be taken by the school district to come into compliance with OCR's requirements). Each plan contained requirements for numerous other supporting plans and reports that had to be submitted to OCR for approval. The requirements included:

- identifying the language skills of LEP students and testing the students in speaking, reading, writing, and understanding, in English and other languages;
- reviewing the selection and quality of instructional programs and materials, and monitoring their implementation;
- recruiting, assigning, and training of staff, including staff in non-LEP programs;
- reclassifying LEP students exiting from the program and monitoring the academic progress of former LEP students over a multi-year period;
- documenting efforts to change the minds of parents who refused placement of their children into LEP programs, requiring special audits if parental refusals exceed 5% of the LEP student population; and developing special, individualized programs (including bilingual instruction) for students who were not placed in the district's programs for LEP students because of parental refusals;

- specifying how the district will change its criteria for Gifted and Talented programs to ensure such programs enroll a proportionate number of LEP students;
- changing special education procedures and programs to accommodate OCR's concerns about LEP students;
- translating school documents into multiple languages and establishing a database of parents who are limited-English speaking; and
- developing sophisticated evaluations of LEP students' progress, including detailed longitudinal studies showing the academic and social progress of LEP students in comparison to their non-LEP peers, and requiring numerous prescriptive reports from school districts over a period of several years.

The OCR letters that are the basis for this report reveal how the lack of clearly stated civil rights policy leads to and is aggravated by inadequate management controls. The difference in interpretations of policy among the regional offices is astounding. Some OCR regional offices operate as federal school boards, dictating 20-30 pages of highly prescriptive requirements on a myriad of issues that are even indirectly related to the education of English language learners. Other regional offices focus only on certain broad issues and bypass matters deemed "critical" by their more zealous colleagues.

THE RECORD OF OCR'S REQUIREMENTS

Over-Identifying LEP Students

OCR's latest policy update (September 1991) states that school districts "should have procedures in place for identifying and assessing [the language skills] of all LEP students." OCR's internal policy documents do not specify any particular procedure for identifying students who speak a language other than English, nor do they establish standards for assessing language skills to determine which students may be limited-English proficient (LEP). The policies as initially written were deliberately silent on these matters, because the agency at that time recognized the wide range of circumstances affecting school systems across the country and wanted to allow local leadership as much flexibility as possible in carrying out the federal requirements.

In recent years, OCR has truncated this flexibility by requiring a two-stage process to identify which national origin students are eligible for alternative language programs (bilingual education or English immersion).The first step is to obtain from parents or older students answers to a home language survey, which contains questions about the language first used by the student, the language spoken in the home, and other similar information. Teachers may also be required to complete a checklist. Any mention of a language other than English on the language survey form or the teacher checklist automatically identifies the student as having a primary or home language other than English (a PHLOTE student), even if the student is, in fact, a fluent English speaker. For example, a student who has always spoken English, but who had a relative in the home for a period of time who spoke Spanish, would, under OCR's current procedures, be classified as PHLOTE.

Students identified as PHLOTE are tested in English, and possibly another language, to determine their language proficiencies in speaking, reading, writing, and comprehension. If the student scores below the designated cut-off point on the English version of the test in any of the categories, the student is designated as limited-English proficient (LEP) and must be placed into an alternative language program (e.g., bilingual education or ESL). Under OCR's procedures, which are not specified in any policy document, the student must be placed into an alternative language program even if he or she is a fluent English speaker, but with deficiencies in reading, writing, or comprehension. By enforcing this procedure, OCR requires school systems to classify national origin minority students as LEP based upon deficits that are similar, if not identical to, educational deficits occurring among many native English speakers.

Also, the LEP designation may have no relation to the student's ability in his or her native language. For example, a student who speaks little or no Spanish, is reasonably fluent in English, but has low reading or writing test scores, would be designated as LEP. OCR's requirement could lead to such students being placed into Spanish bilingual education programs, even if the students spoke no Spanish. This unwritten policy change as enforced by OCR is potentially more intrusive on this issue than were the *Lau Remedies*. Under the *Lau Remedies*, students were not eligible for bilingual programs unless they were dominant in their native language (e.g., Spanish) over English. If they were equally proficient in both languages, or dominant in English, they were

placed into regular English language instructional classes or provided remedial assistance in English.

Excerpt 1: OCR's September 1995 letter to the Albuquerque Public Schools illustrates an application of this policy with some interesting ramifications. In a 1995 compliance review, the Denver OCR office found that some schools in the District were placing Native American and Asian LEP students into Spanish-language bilingual classes.

To the extent that Native American LEP students, Asian LEP students, and other LEP students for whom Spanish and English are second languages receive alternative language services primarily through a Spanish-based bilingual program, these students are not served under a program model that is recognized as sound or considered a legitimate experimental strategy. Academic instruction in Spanish, using an approach that assumes that Spanish or English is the primary language, is functionally equivalent to submersion for students whose primary or home language is not Spanish or English. ***The primary objectives of bilingual education - transfer of academic and literacy skills from the primary language to a secondary language - is not a reasonable educational objective when the language of instruction is not the primary language.***

(Letter dated September 8, 1995 to Albuquerque Public Schools, p. 9.) (emphasis added)

In this instance, OCR arrived at a correct conclusion. However, there was no evidence in the letters reviewed that OCR applies this standard consistently to school systems that place Hispanic students into Spanish bilingual classes. For example, OCR never raised a concern with Albuquerque or other school districts about whether there may be Hispanic students in the Spanish language classes who have such a limited knowledge of Spanish that the "transfer of academic and literacy skills from the primary language [Spanish] to the secondary language [English]" would be essentially non-existent. (As noted earlier, the research has not supported assumption, which is readily embraced by OCR.) OCR's position on this matter is not well-defined, but the agency appears to condone placing LEP Hispanic students into Spanish bilingual classes even if the students speak English better than Spanish. This example also reveals the flaw in lumping together a student's "primary" language with the broader category of "home language." A student may well have a home language other than English,

according to OCR's definition, but be primarily an English speaker.

In the letters reviewed, OCR's regional offices almost always cited school districts for failure to identify adequately LEP students and assess their language skills even when districts had elaborate procedures in place or were following state-approved guidelines. In negotiations with school districts, OCR considers its requirements on these issues to be non-negotiable, although they do not appear in OCR's policy documents.

Excerpt 2: OCR policy does not specify particular methods that schools must use to identify potential LEP students. However, in the example below the Dallas OCR office admonishes the Corpus Christi, Texas, school district for not asking what the agency considers to be necessary questions on the home language survey.

Although the District's identification procedures appear adequate to disseminate the HLS [Home Language Survey] to locate PHLOTE students, the questions included in the HLS do not appear to be sufficiently broad to ensure that all PHLOTE students are promptly and adequately identified. The . . . HLS asks for the following:

1) the parent to identify the language most frequently spoken in the home, and
2) the language most frequently used by the student.

However, the survey fails to address two key areas:

a) The student's first language learned, and
b) whether the student's development of English language skills was influenced by a language other than English. . .

(Letter dated April 25, 1997 to Corpus Christi Independent School District, p. 4)

Excerpt 3: Often OCR staff in one region add new requirements not considered important by another regional office. Thus, only in Dallas is it important to know whether the student's development of English language skills was influenced by a language other than English, while, as indicated below, Philadelphia OCR believes it is more important to find out what language the student's peers speak.

The Philadelphia OCR office required that districts consider students PHLOTE for whom a language other than English is:

- the student's first acquired language;
- a language used in the student's home; or
- a language used by the student's peers.

(Letter dated Nov. 13, 1997 to Avon Grove, PA School District, attached Partnership Agreement, p. 1)

The above requirements would also classify as PHLOTE any English-speaking student who happened to have a grandparent at home who spoke a language other than English.

Excerpt 4: The Denver office added a different twist to the home language survey questions. At the end of questions about: "What language did your child speak or understand?" and "What languages are spoken by persons living in your home?" the Denver staff added the following parenthetical caution: "Do not list languages learned or used only academically." The effect of that restriction is to keep parents from listing English as a language used by the child!

(Letter dated Aug. 20, 1997 to Window Rock, AZ Unified SD, attached Commitment to Resolve, p. 3)

Excerpt 5: The Chicago office, in its letter to Indianapolis Public Schools, took special care in warning the district for what were essentially non-existent deficiencies in the identification of LEP students.

While the District's identification procedures are adequate and properly implemented, in light of the planned changes in enrollment sites for its language assistance program, beginning with the 1997-98 school year, the District will provide an inservice to all relevant staff . . . .

(Letter dated June 27, 1997 to Indianapolis, IN Public Schools, attached Vol. Action Plan, p. 2)

Excerpt 6: Some regional offices, particularly San Francisco and Dallas, cited school districts for what was considered by OCR staff to be an inadequate assessment of students' language skills in Spanish and other languages even though the

districts were appropriately assessing students' English language skills. A typical example of this requirement is found in the San Francisco OCR letter to a California school district. *OCR observed that [school] sites subsequently administered primary language assessments of oral, reading and writing skills for those LEP students whose primary language was Spanish through use of the Spanish Assessment of Basic Education (SABE), or the LAS oral, reading and writing assessments in Spanish. . . . However, the District had no method in place for assessing LEP student oral, reading or writing proficiencies in primary languages other than Spanish . . . The District has agreed . . . to develop and implement a primary language assessment process for languages other than Spanish.*

(Letter dated March 10, 1997 to Orland, CA Joint Unified Elementary School District, p. 4)

Excerpt 7: In a letter to another California school district, the San Francisco OCR continues the theme of assessment in a student's primary language.

OCR found that all four sites conducted primary language testing through the IPT for some languages (Vietnamese, Tagalog, and Spanish) and administered an informal survey of primary language skills. However, OCR observed no regular testing administered in the primary language to assess reading and writing proficiency.

(Letter dated November 3, 1997 to Milpitas, CA Unified School District, p. 3)

Excerpt 8: The Dallas OCR found a problem because a Texas school district did not document to OCR's satisfaction staff training for testing purposes.

. . . There was inadequate documentation to demonstrate that staff receive formal training in administering the respective English proficiency tests and there is no system ensuring that the quality of training remains consistent and adequate throughout the District's campuses. This lack of training raises concerns that students are not being properly assessed at each campus in the District.

(Letter dated April 25, 1997 to Corpus Christi, TX Independent School District, p. 6)

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Excerpt 9: OCR staff found a New Mexico school district out of compliance with regard to the identification and assessment issues, in part because teacher judgments were used.

Although staff members may consider the home language surveys to identify PHLOTE students, in some instances, teacher opinion and preferences are the overriding factors in identifying students to be assessed . . .

(Letter dated June 28, 1996 to Cuba, NM Ind. Schools, p. 9)

Excerpt 10: Of the more than 155 letters reviewed, only a small number offered school officials an alternative to the placement criteria that OCR enforces. This district in Rhode Island was one.

. . . If District staff believe that a student's English language skills are sufficient to enable the student to succeed at grade level even though the student's test scores are lower than the designated cutoffs, the District need not place the student in ESL if the student's last set of grades are all Cs or above and there are work samples from the student indicating that the student has sufficient English language skills to participate effectively at grade level . . .

(Letter dated September 30, 1997 to the Pawtucket, RI Public Schools, attached Compliance Agreement, p. 1)

As shown in the above examples, OCR has become practically inflexible in its application of the assessment requirements. In 1997, OCR referred the Denver Public School system to the Department of Justice for enforcement proceedings in part because of the District's practice of using teacher judgment and grades to reassign students to English language classes, rather than relying strictly on test scores. Why has the agency taken such a hard position on the matter of relying on test scores in a number of language-related competencies to determine who is an LEP student? OCR has informally adopted a definition for LEP that has wide support among bilingual advocates who were concerned that earlier definitions, which were based solely upon a student's ability to use and understand spoken English, would limit the number of students eligible for bilingual education.

These and dozens of other similar examples demonstrate the actions of an agency that has lost sight of its legal purposes, as well as any sense of the realities of school life. Finding schools in

violation of civil rights laws for not testing reading and writing in languages such as Tagalog or Vietnamese when there is no legal requirement to do so (or available written tests in those languages), and for not documenting training programs that are also not required by law, is evidence of a bureaucracy gone awry.

Excessive Requirements for Instructional Programs

OCR requires its stamp of approval on many curriculum and staffing decisions. A March 19, 1997 letter of findings from the Dallas OCR to the McAllen, Texas, School District, and the subsequent compliance agreement, illustrate the intrusiveness of OCR's procedures. McAllen is located in south Texas near the border with Mexico. In 1995-1996, the District identified more than 12,000 PHLOTE students (59% of the total student population). McAllen has a long history of educating LEP students through a variety of programs, including bilingual education. For years, the District followed the Texas State Plan for Bilingual Education, which contains options for either bilingual education or ESL programs.

The District also employed many Hispanic (and Spanish speaking) teachers, administrators, and teacher aides. In spite of this history of accomplishments and acquired expertise, OCR staff, who are almost totally untrained in sound educational practices, spent a few days in the District, then wrote a lengthy letter severely criticizing McAllen on a range of matters related to its program for LEP students, including the quality of the District's bilingual and ESL programs and teaching staff. OCR also challenged the quality of textbooks in the classrooms for LEP students and scolded the District for not automatically assigning Spanish-speaking teachers to teach LEP students, or doing more to keep Hispanic parents from withdrawing their children from bilingual programs

Excerpt 11: OCR concluded its criticism of the McAllen school district's programs and practices with the charge that the District was inconsistent in the implementation of its bilingual program.

. . . After visiting various campuses throughout the District, a concern regarding the lack of consistent implementation of the District's bilingual curriculum arose. OCR found that there was a lack of consistency regarding the type of programs that were being offered at the various schools in the District. Additionally, OCR found District-wide lack of consistency in the ALP [Alternative

Language Program] course-titles at the secondary level, making it difficult for Central Office Administrators to properly coordinate and verify that BE [Bilingual Education] or ESL course-content and delivery was consistent with the District's goals for the ALP.

(Letter dated March 19, 1997 to the McAllen, TX Independent School District, p. 10)

Excerpt 12: OCR summed up its case against McAllen's alleged inadequate instructional programs with bureaucratic doublespeak.

The totality of the circumstances cited above create enough inconsistencies with Title VI requirements to require immediate action to remedy these deficiencies because the facts strongly indicate that LEP students are being denied an equal educational opportunity.

(Letter dated March 19, 1997 to the McAllen, TX Independent School District, p. 11)

McAllen was required to submit a compliance agreement that totaled 24 pages of detailed requirements, including numerous reporting actions and due dates extending over a four-year period. For years to come, the District's priorities in a number of areas will be defined by the OCR-imposed agreement based solely upon the judgment of OCR officials who lack the expertise and perspective to direct those priorities. **Whatever OCR is doing in McAllen and in other similar instances across the country, it is not civil rights law enforcement.**

The San Francisco regional office shared with Dallas the distinction of issuing the most intrusive requirements, particularly regarding instructional programs and staffing.

Excerpt 13: As evidenced in the following quotes, the San Francisco office also has worries about consistency.

In examining how the District's program for LEP students was actually being implemented, however, OCR identified varying degrees of ELD [English Language Development] instruction among the sites, as well as different methods being used to provide LEP students with access to the core curriculum, including bilingual, sheltered, and mainstream classes.

OCR further found that at each site bilingual instructional assistants were assigned to administer some or all of these assessments, and that ***there was not a consistent process in place to provide formal training to such personnel.***

LEP students at MSES were, with few exceptions, placed in either a bilingual (Spanish) or sheltered self-contained class (designated as an "ELD" class) with an appropriately qualified teacher, but the ELD curriculum and instructional method differed from class to class . . . ***OCR did not observe a pattern of LEP students failing to receive ELD in some form at this site. However, the program was not coordinated*** *so that students placed in different classes and enrolled in different grade levels received consistent, progressive ELD instruction.*

(Letter dated March 10, 1997 to Orland, CA Public Schools, pp. 4 and 5) (emphasis added)

Like McAllen, Texas, and other districts OCR visited, the Orland school system must respond to these charges by modifying its programs to suit the judgments and opinions of the federal officials, no matter how flawed or inappropriately prescriptive those judgments may be.

It is no coincidence that many of the specific examples cited in this report come from the Dallas and the San Francisco OCR offices. These two offices have consistently maintained the "old style" OCR format of spelling out problem areas in great detail. Most other regional offices are placing similarly intrusive requirements on school systems, but have adopted more cursory letter writing formats that hide the requirements under boilerplate language.

For example, the Philadelphia regional office issued a letter dated November 13, 1997 to the Avon Grove, Pennsylvania, school district. The cover letter from OCR was only one and one-half pages long, confirming that the District had agreed to carry out all the items in an attached 14-page "partnership agreement." The agreement was a long list of requirements and procedures the District must implement, with reporting documents due to OCR until the year 2001. In many ways, the Avon Grove agreement is as intrusive as the documents prepared by the San Francisco and Dallas staff. However, unlike the Dallas and San Francisco letters, the very cursory cover letter and the generic language of the agreement do not reveal what is actually being required, or even

what information OCR may have uncovered to support the need for any of the changes.

OCR's ad hoc approach to investigations and the staff's rush to judgment affected large as well as small school systems. In a letter dated August 1, 1996 to the Fort Worth, Texas, Independent School District, which operates 113 schools, OCR reported that its staff had investigated programs at seven elementary schools, three middle schools, three high schools, and one special secondary school (the International Newcomers Academy, a pilot program for serving secondary level recent immigrant students). Although 99 of Fort Worth's 113 schools were not reviewed by OCR staff, OCR cited the District for numerous items of District-wide non-compliance and required a 30-page corrective action plan. OCR's interviews with teachers and classroom observations at the small number of schools visited were the basis for determining that the District's ESL and bilingual programs were inadequate.

Excerpt 14: OCR staff often reached conclusions about District programs that they lack the qualifications and expertise to make.

The program described by the two ESL teachers interviewed is not "reasonably calculated to effectively implement" the ESL program as required by Castaneda.

(Letter dated August 1, 1996 to the Fort Worth, TX Independent School District, pp. 8 and 9)

In many of the letters reviewed, OCR staff regularly made such judgments based upon their classroom observations, or whatever information teachers offered to share with them. The information obtained was often filtered through the biases of the staff investigator and selectively presented to portray the worst possible scenario.

In the non-compliance letter to Fort Worth, OCR also took issue with the District's operation of the International Newcomers Academy, even though students were in the Academy with their parents' permission, and OCR admitted that "Interviews with INA students and former INA students revealed positive impressions of the INA and its staff." (p. 12)

OCR letters recite the policy that allows districts to choose their instructional programs for LEP students. However, when it reviews

a district in a state that requires or permits bilingual education, the agency vigorously and disproportionately enforces the state bilingual mandate.

Excerpt 15: In the examples below, OCR admonishes a Massachusetts school district for insufficient instruction in Spanish, including a lack of Spanish chemistry and math classes at the high school level.

While the District purportedly operates a bilingual program for grades K-12, OCR found . . . that there is no formal Spanish instruction occurring at the K/1 level . . ." The focus of instruction at that level revolves around the Basal series in English. At Charlton Street School and Wells Junior High School, the District does not instruct students in reading and writing Spanish as part of the Spanish bilingual program, even though the instruction is required under the District's chosen model. At West Street School and Southbridge High School, the District did instruct bilingual students in reading and writing Spanish..

OCR found that District bilingual education classrooms lack bilingual materials, books and computer software. OCR found that report cards, progress reports, and notices are not consistently sent home in the native language of students' parents. OCR found through interviews at the high school level that materials for the TBE [transitional bilingual education] program, when ordered, often arrive late, and that the TBE Math/Science curriculum offerings vary widely from year to year, with no TBE chemistry being offered, and the TBE math offerings constituting a lower-standard curriculum than the regular education curriculum.

(OCR letter dated September 20, 1996 to the Southbridge, MA Public Schools, pp. 7 and 8)

Excerpt 16: The above excerpts represent a small portion of the deficiencies OCR found with Southbridge, Massachusetts' bilingual program. Most of the 13-page letter of noncompliance focused on the District's failure to implement some aspect of its bilingual program. Only one sentence in the letter addressed inadequate ESL services.

. . . The District also offered inadequate ESL services at West Street, as the multigraded bilingual class received only 40 minutes of ESL instruction per day, during which time the ESL teacher was required to address the needs of students in different grades and different proficiency levels.

(Letter dated September 26, 1996 to the Southbridge Public School, p. 8)
Southbridge must follow Massachusetts state guidelines; however, OCR is not bound to go beyond federal guidelines.

Excerpt 17: In the example below, OCR prescribes, with detail and forcefulness, the bilingual instructional program it expects the Southbridge schools to implement.

The District will provide a TBE program for Spanish LEP students, and will initiate TBE programs on an ongoing basis for other language groups as numbers warrant, in accordance with Massachusetts law. As part of the Spanish TBE program, the District will teach reading and writing in both Spanish and English. The District will oversee the instructional flow in all TBE classes to ensure that instruction in both languages is available and provided at all schools.

The District shall ensure that all required content area courses at the high school level . . . are available in the native languages until LEP students can participate effectively in the standard English language instructional program . . . the District will ensure that LEP students at the high school level have access to high standards curriculum, including courses in TBE math and science, including chemistry. At Southbridge High School, the District will provide LEP students with access to math classes above the Algebra I level by offering TBE math classes at higher levels or through the use of bilingual associates . . .

(Letter dated September 26, 1996 to the Southbridge Public School, attached Compliance Agreement, p. 3)

Excerpt 18: OCR demonstrates its unwavering support for bilingual education by prescribing detailed bilingual education guidelines for a California school district, including primary language instructional support for "all content areas."

The District will develop and implement guidelines to ensure that an adequate amount of primary language [languages other than English] aide support is provided at all grade levels by bilingual instructional aides to LEP students . . . The guidelines will specifically describe how ***all students will be provided with primary language support during instruction in all core content areas , in order to receive equivalent access to the subject matter***

***curriculum**. The amount of primary language support delivered will be determined by the needs of the students, not by resource limitations. The guidelines will also describe the amount of time that bilingual instructional aides will be assigned in bilingual/primary language classes . . .*

The District will develop and implement guidelines for teachers as to the types of primary language and adapted materials which should be used for various grade levels and courses enrolling LEP students with different English proficiency levels. The guidelines will also describe what type of primary language and adapted materials should be available in school libraries . . .

(Letter dated June 6, 1996 to the San Leandro, CA Unified School District, attached Remedial Action Plan, pp. 4 and 5) (emphasis added)

Excerpt 19: OCR finds a school district in the state of Washington provides English acquisition and academic support classes at all grade levels. However, OCR finds the district in violation of Title VI because it did not provide bilingual instruction to LEP students. OCR did not address whether the LEP students were in fact dominant English speakers.

*Regarding whether the alternative program is likely to be effective, **OCR found that the District provided English acquisition and academic support classes through its Bilingual Program at all grade levels . . . However, OCR found that the District's program, as currently designed, was not effective in providing LEP students equal and meaningful access to the District's program of instruction. Specifically, OCR identified LEP students at the elementary school level and the junior and senior high school levels who could not fully participate in or benefit from the regular academic program of instruction in which they were enrolled because the academic program content was only in English** . . . Because the District has failed to ensure that all language-minority students in the District are able to fully participate in and benefit from the District's program of instruction, OCR finds that the District has denied language-minority students an equal opportunity to participate effectively in the District's program of instruction. **Therefore, OCR concluded that the District did not comply with Title VI at 34 CFR 100.3(a) and (b)(1)(iv)** . . . .*

(Letter dated March 13, 1996 to the North Franklin, WA School District, p. 8) (emphasis added)

Excerpt 20: OCR staff make favorable judgments about the adequacy of Spanish-language texts and materials in a California school district, but find a violation because the district did not have such materials available at the high school level. (Note that even the *Lau Remedies* did not require bilingual instruction for high school students.) Also, OCR criticizes the District because students from Asian language groups in specially designed English classes did not have access to the core curriculum in their primary language.

OCR found that the District's Spanish primary language instruction classes for grades K-8 generally had sufficient Spanish language texts and materials for most of the curriculum . . . At the three regular high schools, a significant number of Spanish-speaking LEP students are not receiving core curriculum instruction in their primary language . . .

*OCR found that **students** [in grades K-8] who speak a language other than Spanish receive instruction through SDAIE [Specially Designed Academic Instruction in English] strategies and **do not have access to the core curriculum in their primary language**. These students also lack primary language materials to supplement their instruction . . .*

(Letter dated December 18, 1996 to the Pomona, CA Unified School District, pp. 10 and 11) (emphasis added)

Excerpt 21: In the same District, OCR criticizes school officials for not placing Spanish-speaking students in appropriate (i.e. bilingual) classes with qualified teachers, while admitting that the District is continually receiving such students throughout the school year in fluctuating numbers. OCR's terms "equal access" and "access to the core curriculum," used here and by other regional offices, almost always refer to bilingual education. OCR judges that in grades 9-12, Asian students have reached sufficient numbers to require the District to implement bilingual instruction for them. <u>The bottom line is that the District is out of compliance for not providing sufficient amounts of bilingual education instruction.</u>

OCR found that most Spanish speaking students in K-8 are receiving equal access to the core curriculum . . . OCR found that

Spanish speaking students in grades 9-12 did receive access to the core curriculum [primary language instruction], but access is limited . . . due to staffing deficiencies. Additionally, due to the fluctuating school population, the District receives new Spanish speaking students at all times during the year. These students may not be placed in an appropriate class setting because of a lack of qualified teachers . . .

OCR further determined that LEP students in grades 9-12 who speak languages other than Spanish, have no access to primary language instruction. There is an indication that the numbers of some of the Asian speaking languages at a particular school site may now have reached the proportions that would require some primary language instructional support . . . . ***Therefore, OCR determined that the District is out of compliance with Title VI with respect to ELD [English Language Development] instruction and access to the core curriculum for significant numbers of LEP students . . .***

(Letter dated December 18, 1996 to the Pomona, CA Unified School District, p. 12)

Excerpt 22: OCR criticizes a California school district for offering core content instruction only in English at the high school level. OCR disregards the district's position that these students were English speakers. OCR also inappropriately judges the educational program at one school to be "insufficient" to meet the needs of students.

La Mirada High School had 126 LEP students enrolled. Of this total, 86 LEP students were Spanish speaking, 10 were Filipino, 9 were Korean, and 21 spoke other languages . . . The school offered no core content classes which were structured for English learners. ***All core content classes were conducted in English only*** *and OCR found no evidence the school offered sheltered content courses or courses where core content instructors had adopted instructional methodologies such as specially designed academic instruction in English (SDAIE). In addition, OCR found no primary language support outside of the ESL classroom . . .*

The OCR review of the instructional program [at Norwalk High School] for LEP students found the program to be insufficient to meet the needs of the students. *The program provides three levels of ESL instruction taught by appropriately credentialed instructors; however, not all LEP students were assigned to the*

ESL classes. ***OCR was advised that the LEP students not assigned to ESL had reached English proficiency but did not meet all criteria for redesignation****. OCR also noted that not all Spanish speaking LEP students assessed as NEP [non-English speaking] were receiving L1 [Spanish] instruction in the core curriculum . . . There was insufficient primary language support in the science program . . . OCR observed that some classrooms, including Earth Science and Algebra, had an insufficient number of bilingual or Spanish language texts for the students enrolled.*

(Letter dated April 26, 1996 to the Norwalk-La Mirada, CA Unified School District, pp. 8, 9, 10, and 11) (emphasis added)

Excerpt 23: OCR dictates the requirements for bilingual classes at a New York school system.

The District assures OCR that it will ensure that LEP students will participate in content area classes while enrolled in the alternative language program. Bilingual content area classes must be comparable to those provided to non-LEP students (e.g., grade-level programs will be comparable, remedial programs will be comparable).

(Letter dated November 26, 1997 to the Brentwood Union, NY Free School District, attached Resolution Agreement, p. 10)

Excerpt 24: OCR points out the obvious to a Colorado school district: adequate materials are not available in languages other than English. OCR does not explain why teachers are expected to have non-English language materials in ESL classes. Nevertheless, the school district was required to submit a plan to correct the "problem."

OCR concluded that the District does not provide adequate material consistent with the provision of its ESL program due to the unavailability of ESL-specific reading textbooks and content area textbooks in languages other than English.

(Letter dated June 21, 1996 to the Mesa County Valley SD #51, Grand Junction, CO, p. 16)

Excerpt 25: In a few instances, OCR was faced with direct evidence that English language instruction was inadequate when compared to instruction in other languages. In the Cuba, NM, example below, OCR did not criticize the disparity, but

did require some increase in English language instruction that brought it to parity with Navajo instructional time, though apparently still below the total instructional time in Spanish. (The Cuba letter and corrective action plan totaled 56 pages.)

LEP students receive ESL instruction 25 minutes daily, 45 minutes of Spanish instruction, and as the enrichment component, Spanish culture instruction for 30 minutes twice a week. The teacher's assistant provides 45 minutes of Navajo instruction daily to the Navajo-speaking students . . .

(Letter dated June 25, 1996 to Cuba, NM Independent Schools, p. 12)

Thus, on a weekly basis, LEP students received 125 minutes of instruction in ESL compared to a total of 285 minutes of instruction in Spanish (for Hispanic LEP students), and 225 minutes of instruction in Navajo (for Navajo LEP students). This obvious disparity in instructional time spent on English did not warrant any criticism from OCR in its 30-page letter to the Cuba Superintendent. However, in the 26-page corrective action agreement submitted by the District, OCR required Cuba to increase the amount of time for ESL instruction to 45 minutes per day. That made English instructional time equivalent to that of Navajo instruction, but still kept it below the 285 minutes spent each week on instruction in Spanish.

Excerpt 26: As in the Albuquerque case cited earlier, OCR finds that the Cuba School District was inappropriately placing Native American students into Spanish bilingual classes. However, there is no evidence in the compliance letter that OCR made any inquiry to determine whether Hispanic students placed into all-Spanish instructional classes were dominant English speakers.

Some Native American LEP students whose primary or home language is not Spanish or English receive only Spanish-based bilingual education services, without ESL instruction. To the extent that these students receive alternative language services primarily through a Spanish-based bilingual program, these students are not served under a program model that is recognized as sound or considered legitimate experimental strategy.

(Letter dated June 25, 1996 to Cuba, NM Independent Schools, p. 14)

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Excerpt 27: The plan from the Alamosa, NM, schools told OCR what the agency wanted to hear: the District would implement bilingual programs even with Konjobal-speaking students. The plan covered a number of curriculum and educational issues, and prescribed allocation of funds for linguistically and culturally diverse materials.

There is planned instruction of subject/content areas in the students' primary languages (in English for English-dominant students, in Spanish, for Spanish-dominant students, and in Konjobal [Guatemalan] for Konjobal-dominant students). *(p. 17)*

By 1998-99, the Two-Way Enrichment Bilingual program and the ESL alternative language program with sheltered English instructional methodology will be integrated as one program for grades preschool through 12. (p. 20)

The District will purchase linguistically and culturally diverse instructional and resource materials from the $111 allocated to each school site per student according to the School Finance Act . . . . The preponderance of linguistically diverse instructional materials will be in Spanish since there are no formal commercial materials available in Konjobal*. However, the District will procure the services of community members of the Guatemalan community to create culturally relevant materials . . . The Spanish instructional materials will consist of content relevant to basis instruction, e.g. Reading, Math, Science, History, as well as a variety of whole language and other developmentally appropriate Spanish, sheltered English, and culturally-relevant materials. (p. 39)*

During the interim phase [of OCR Plan implementation], and thereafter, ***all District schools' library [sic] will allocate a percent of its budget to purchase Spanish literature, and reference and media material which is developmentally and culturally appropriate****. The schools will expend an amount beyond the proportion of LEP students in order to "catch up" through equitable means during the interim phase. During the permanent phase,* ***allocation of library materials will be proportional to the percent of LEP students enrolled in the respective schools****.* (p. 39)

(Letter (Fall 1995) to the Alamosa, NM Schools, attached corrective action plan, pp. 17, 20, and 39) (emphasis added)

Excerpt 28: A Cleveland OCR letter stops short of stating a direct bilingual education requirement, although such a requirement can be inferred from the language.

The minimum service levels established by the School District of the City of Pontiac will be designed to ***ensure that substantially all of the instructional time during the school day will be meaningful and comprehensible to the student.***

(Letter dated August 26, 1997 to the Pontiac, MI School District, attached Compliance Agreement, p. 5) (emphasis added)

Excerpt 29: Several quotes taken from a letter to a California school district show a pattern of highly inappropriate actions by OCR generally second-guessing the District's decisions on how it utilizes its teacher aides to teach LEP students, criticizing the district for not providing primary instruction in the Tagalog language when a qualified instructor in that language was obviously not available for several months, determining whether teachers of LEP students were using appropriate classroom instructional methodologies, and concluding that certain classroom materials were inappropriate. OCR does not stop there. It also finds that the history class for LEP students was not covering the same period of history as the history class for English speaking students! Finally, OCR dictates to the school system that teacher aides must first be used to provide LEP students access to core content instruction (i.e., bilingual education) before being assigned to English Language Development classes for these students.

(OCR questions the assignment of teacher aides:)

At Randall Elementary, students at lower English proficiency levels were clustered and placed with teachers designated to instruct LEP students . . . These teachers received some primary language support by primary language aides—two Spanish-speaking and one Vietnamese-speaking. In addition, some of the teachers spoke a second language and provided primary language support to students in need. ***OCR observed that the aides were often used with the most limited students for the purpose of oral language development in English, instead of providing primary language support so students could access content instruction.*** *(p. 6)*

At the time of the on-site visit, the site had succeeded in hiring a Tagalog aide, following a long search. OCR identified several Tagalog-speaking students who, as a result of the delay, were not provided necessary primary language support for most of the academic year. (p. 6)

(OCR judges the appropriateness of instructional materials, and student placements:)

In general, OCR observed that teachers for the designated SDAIE [Specially Designed Academic Instruction in English] classes used appropriate sheltering methodologies and grade-level curriculum. OCR observed that LEP students in the ELD program only, and not in mainstream language arts, did not receive a consistent program of SDAIE language arts . . . In addition, OCR found that a number of LEP students were placed in mainstream content courses without support or specialized instruction. ***Such placements may have been appropriate, depending upon the relative English proficiency of the student and the extent to which the content area was language dependent, but there was no systematic method of determining whether these placements were appropriate for the student****. (p. 7)*

. . . OCR observed that students at the lowest levels of English proficiency at this site were not provided access to certain areas of the core curriculum . This concern was expressed by parents of LEP students as well . . . ***A review of the material utilized in these classes confirmed that students were not provided effective access to grade-level curriculum in either social studies or science****. (p. 7)*

(OCR questions the comparability of history classes:)

OCR observed some SDAIE classes where sheltering techniques were evident and the students were provided a grade-level curriculum. ***However, OCR identified one SDAIE history class which did not cover the same period of history covered in the equivalent mainstream history class****. (p. 8)*

(OCR prescribes primary language instruction and determines that the District's priority for placing teacher aides should be primary language instruction, not English Language Development)

The guidelines will specifically describe how all such students will be provided with primary language support during instruction in

all core content areas, in order to receive equivalent access to the subject matter curriculum. The amount of primary language support will be determined by the needs of the students, not by resource limitations. ***The guidelines will also indicate that placement of aides to support the delivery of English Language Development (ELD) will only occur after all LEP students receive necessary support in accessing core content instruction.*** *(Attached Voluntary Resolution Agreement, p. 4)*

(Letter dated November 3, 1997 to the Milpitas, CA Unified School District, pp. 6, 7, and 8, and the Voluntary Resolution Agreement, p. 4.) (emphasis added)

Excerpt 30: Without presenting any evidence of wrongdoing, OCR finds the Newport-Mesa school district in violation of Title VI because it does not assign Hispanic and LEP students to certain courses in a manner that meets OCR's inappropriate quota. The District's defense was that all courses are open to all students, and student choices determine the enrollments. OCR faulted the District because it had not "systematically addressed the issue."

OCR found that Hispanic and LEP students were significantly over-represented in most basic skills (non-college preparatory) mathematics and science courses and were underrepresented in many college preparatory and upper level mathematics and science courses, and that this was true to varying degrees at all District intermediate and high school sites. OCR found that, on a District-wide basis, the disproportions were statistically significant in a number of subjects.

For example, ***during the 1994-95 school year, at Costa Mesa High School, Hispanic students were 27% of the enrollment in the high school grades, yet they constituted only 10% of the enrollment in Algebra 1A, 6% of the enrollment in Geometry 1A,*** *less than 1% in Algebra 2A, and 5% in Trigonometry. In the science program, Hispanics constituted only 13% of the enrollment in Biology, 9% in Chemistry, 8% in Physics, and even smaller proportions in advanced placement courses.*

The District responded that all courses are open to all students meeting the course prerequisites and that the primary factor in determining course participation is student choice.

OCR found that, while aware of minority under-representation in math and science, ***the District had not systematically addressed this issue.*** [Discussion on this issue covers a total of 5 pages, and OCR gets the District to "agree" to data collection and steps they hope will increase minority representation.]

(Letter dated January 26, 1996 to Newport-Mesa, CA Unified SD, pp. 2 and 3.) (emphasis added)

Intrusive Directives for Staffing

OCR regional staff frequently made judgments about the qualifications of bilingual as well as non-bilingual teachers and required school systems to take actions based upon these judgments. Given OCR's very broad definition of LEP students, many of these students are fully English speaking but remain LEP because of deficiencies in reading, writing, or certain content subjects. Schools often appropriately place these more advanced English-speaking "LEP" students into regular classes with teachers who may not have had (or need) specialized training in teaching English to non-English speaking students. Some OCR regional offices, especially San Francisco and Dallas, cited such placements as evidence of violation of the civil rights laws, arbitrarily demanding that *all* district teachers receive specialized training on teaching LEP students.

Another recurring theme throughout OCR's letters is the general shortage of trained bilingual teachers at all grade levels, even in the Spanish language. School systems that were attempting to implement bilingual education programs were placed under constant pressure to find bilingual teachers and aides and to train existing staff to teach in a bilingual program. OCR never suggested strengthening English language development classes, rather than pursuing the often unreasonable demands of bilingual programs.

A third frequent theme was OCR's insistence that school systems reassign bilingual teachers and aides to bilingual classes, whether or not such staff wanted those teaching assignments.

Excerpt 31: OCR finds a California school system in violation for not having a sufficient number of trained bilingual teachers and primary language support, according to OCR's judgment and standards.

With respect to overall access issues, OCR confirmed several bilingual classes at the elementary level, which were staffed by appropriately qualified teachers, delivered primary language instruction for Spanish-speaking students with low levels of English proficiency. However, where primary language was not available, OCR found that students were assigned to classrooms which provided few services to assist them in accessing content instruction. ***In some cases, students were assigned teachers with little or no training, or who lacked formal qualifications, in providing services to LEP students*** *. . . At Bahia Vista, OCR identified a teacher who had a Language Development Specialist certificate but who was assigned eleven very low level LEP students without primary language aides support . . .* ***In summary, OCR found that the District program failed to ensure access for all LEP students because of the assignment of unqualified teachers and lack of sufficient primary language support.***

(Letter dated May 23, 1996 to the San Rafael, CA City Schools, p. 5) (emphasis added)

Excerpt 32: In a notable display of judgmental arrogance, OCR staff challenge the Spanish fluency of a bilingual high school teacher in a California school district. OCR emphasizes its requirement that the District in fact must have two equal curriculums for grades K-12: one in Spanish and one in English.

With respect to access to core curriculum and college track courses for LEP students, THS [Tomales High School] has offered "World History in Spanish," and "Algebra in Spanish." However, the teacher of these courses did not possess a credential or certification to qualify him for primary language instruction in Spanish. ***While OCR was told that this instructor was fluent in Spanish, there were questions about whether the level of fluency was adequate to the course content . . .***

The revised Master Plan will describe how students whose primary language is Spanish will be provided with the appropriate amount of primary language instruction or support during instruction in all content areas in order to receive equivalent access to the subject matter curriculum. *The Master Plan will specify how primary language support will be provided at the elementary, middle, and high school levels.*

***The District will ensure that LEP students at each school are provided the same curriculum content as are non-LEP students in all subject matters areas for the particular grade or course they are in**, regardless of whether or not the class is designated as providing special language assistance to LEP students . . .*

(OCR letter dated September 30, 1996 to the Shoreline, CA Unified School District, page 8; attached Remedial Action Plan, pp. 2 and 3) (emphasis added)

Excerpt 33: OCR restricts training options for teachers in a California school district.

*All current employees who are teachers-in-training for an SB1969 Certificate of Completion will be required to take the District training and evaluation. **No one will have the option of taking the training elsewhere** . . .*

(Letter dated February 3, 1997 to the West Contra Costa, CA Unified School District, attached Resolution Plan, p. 5) (emphasis added)

Excerpt 34: OCR staff criticizes a Texas school district for not assigning bilingual teachers to bilingual classes. OCR also takes issue with the District using bilingual/ESL teachers who have "Grand-fathered" credentials, even though such credentials had been approved by the State of Texas. The argument that some teachers are not versed in the latest teaching methodologies could be applied to any teacher who has been teaching for a few years. More to the point, OCR is simply not qualified to make such judgments and should not be doing so. (The letter and agreement totaled 53 pages.)

***The District appears to have hired and maintained an adequate number of endorsed BE/ESL staff to implement the ALP, however, the District does not seem to be adequately assigning ALP-certified staff to meet its ALP program needs.** For example, data indicate that the District currently has 112 BE/ESL-certified teachers who are not teaching in the ALP. Instead of using these BE/ESL certified teachers in the ALP, the District has a substantial number of ALP instructors who are on a provisional permit to teach in the ALP while they obtain their ALP certification.*

Furthermore, the District has at least 6 and17 "Grand-fathered" teachers instructing at the high school and elementary levels,

respectively. ***Although these "Grand-fathered" instructors are considered certified to teach in the ALP by the State, interviews revealed that many lack recent and appropriate training in the newer and most adequate ALP methodologies.***

(Letter dated April 25, 1997 to the Corpus Christi, TX Independent School District p. 21) (emphasis added)

Excerpt 35: This excerpt is a salient example of OCR's prescriptive requirements on staffing. Similar requirements were imposed on school systems across the country.

CCISD will develop a process for incorporating into its teacher appraisal system criteria for assessing the delivery of . . . alternative language services (bilingual/ESL) by teachers in the alternative language program *. . . By June 30, 1998 and 1999, the District will have on record for OCR review the process, along with a copy of a memorandum signed by the Assistant Superintendent . . . to all alternative language program instructors and site administrators regarding the requirement for following the Bilingual or ESL curriculum . . .* ***By October of school years 1998 and 1999, the District will have on record for OCR review supporting documents of implementation, i.e. , a sampling of performance BE or ESL implementation teacher evaluations*** *. . . The District will provide training in bilingual or ESL methodologies to all Alternative Language Program (Bilingual and ESL) teachers no less than once a year. At least one of the training workshops will be at the beginning of each school year . . .* ***The District will develop and implement a program of annual training for all administrators, core subject-area, and special education teachers in classroom techniques and methodologies for second language learners*** *. . .*

(Letter dated April 25, 1997 to the Corpus Christi, TX Independent School District, attached Services Delivery Program, pp. 12 and 13) (emphasis added)

Excerpt 36: This provides an example of OCR's highly inappropriate involvement in teacher pay scales, here in an Indiana school system.

Beginning with the 1997-98 school year, the District will ensure that the quality of services provided to ESL students is not adversely affected by its failure to provide certified pay to its qualified ESL staff. To this end, ***the District should begin phasing***

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***in certified pay to current ESL instructors and encourage non-certified staff to pursue certification by offering incentives**. The District should also guarantee certified pay to all ESL staff upon completion of certification requirements.*

(Letter dated April 17, 1997 to the Metropolitan School District of Lawrence Township, Indianapolis, IN, attached Voluntary Action Plan, p. 3) (emphasis added)

Excerpt 37: In this instance, an Indiana school system is told not to worry if they cannot hire ESL teachers. Usually, OCR takes the opposite position, setting aside legitimate District reasons for the inability to hire teachers, especially bilingual teachers.

It is acknowledged that the State of Indiana does not require ESL certification, and that a significant pool of ESL certified and endorsed candidates is not readily available at the District. As a result, OCR will not penalize the District for not reaching this goal, provided the District makes a good faith effort towards meeting the goal.

(Letter dated December 18, 1997 to the Fort Wayne, IN Community Schools, attached Voluntary Action Plan, p. 7)

Excerpt 38: This example is the polar opposite from the message delivered in Excerpt 37 above. Here, OCR tells a Rhode Island school system that the district's reasons for not finding qualified staff for the bilingual program, although real, are not acceptable.

*As you know, proper implementation of the LIFT proposal [bilingual education program] will depend on the District's ability to obtain enough qualified bilingual teachers to serve the students in the program. . . We understand that Providence's residency requirement for teachers may be a barrier to obtaining qualified staff. Another barrier faced by school districts, and perhaps by Providence as well, is the fact that bilingual teachers sometimes choose to transfer to regular education programs once they have seniority. **OCR does not view either of these barriers as sufficient to justify the District's failure to obtain qualified staff**.*

(Letter dated August 13, 1996 to the Providence, RI Public Schools, p. 2.) (emphasis added)

Excerpt 39: This is another of many examples in which OCR second-guesses a district's staffing decisions and its use of instructional resources. In so doing, OCR gives lower priority to ELD instruction. The letter also maintains the OCR formula in California that everyone must have instruction through the primary language, even Vietnamese students for whom no qualified Vietnamese-speaking staff are available.

This site [Rose Elementary] had two bilingual (Spanish) instructional aides assigned, and a portion of their time was spent providing ELD to students in the bilingual program. OCR identified Spanish-speaking LEP students outside of designated bilingual classrooms who would have benefited from the assistance of aides in accessing the curriculum. Given that the site had only a limited amount of aide support, assigning aides in this manner was not a good use of resources. OCR also identified a number of Vietnamese-speaking non-English proficient (NEP) students who required primary language support to access content instruction, but the site was not staffed with an aide proficient in Vietnamese.

(Letter dated November 3, 1997 to the Milpitas, CA Unified School District, p. 6.)

OCR staff engages in unwarranted social engineering. Occasionally, school systems were required to provide "sensitivity" and diversity training to non-minority teachers and administrators, without considering whether such training might be on its face discriminatory or otherwise specifying how such training would improve educational performance. The excerpts below illustrate the extent of OCR's reach as a self-appointed guardian of social conscience.

Excerpt 40: In a letter to an Arizona school system, OCR's directive strays well beyond the areas of adequate instructional programs and staffing to issues of diversity and sensitivity training for all staff. There is no legal basis for such a requirement, and little or no credible research supporting the notion that sensitivity training for staff results in improved performance of minority students.

The District will provide multi-cultural/sensitivity training for all District staff, to stimulate awareness of language minority students' educational needs and to encourage cooperative efforts between the District, community, and parents.

(Letter dated April 7, 1997 to the Tempe Elementary SD #3, attached Resolution Agreement, p. 4)

Excerpt 41: OCR faults a Massachusetts school system because it did not adequately consider cultural impact issues caused by using non-Hispanic staff in the referral, evaluation, and placement of Hispanic and bilingual students into special education classes. OCR also chastises the district for not requiring all teachers to take diversity training.

The OCR file review and its interviews with District staff also indicated little evidence that consideration was afforded to the question of the potential impact of cultural issues on the referral, evaluation and placement of Hispanic students. The investigation revealed that due to a paucity of Hispanic and bilingual staff, most referral, evaluation, and placement decisions for Hispanic and bilingual students were made by non-Hispanic, English-speaking staff. ***Only a few of the teachers interviewed noted they had participated in the diversity training which the District had previously offered as optional, not as mandatory training.***

(Letter dated September 20, 1996 to the Southbridge, MA Public Schools, p. 11) (emphasis added)

Excerpt 42: OCR places an inappropriate requirement on a Wisconsin school district to provide diversity training for all staff, and strongly encourages that the training be mandatory.

The District will ensure that all school staff and administrators are prepared to work with a culturally, racially, and linguistically diverse student population. By January 31, 1997, the District will consult with experts in the field to fully evaluate the need for increased multicultural training . . . ***The District will consider making diversity training mandatory for all new and continuing administrators and staff.*** *All training programs necessary to meet the goal of this paragraph will be implemented by the end of the 1997-98 school year.*

(Letter dated November 26, 1996 to the Racine, WI Unified School District, attached Action Plan, p. 1) (emphasis added)

Overriding Parental Choices

OCR policy documents are silent on the issue whether parents of LEP students may refuse to have their children participate in

bilingual or ESL programs, or withdraw their children from such programs when placed there by school officials. Until 1993, OCR's unwritten policy on this matter had been that school systems must inform parents of the alternative language services programs available, but permit parents to refuse placement of or withdraw their children from such programs. Further, if parents made an informed choice to withdraw their children from school programs established for LEP students, school systems did not have the extra burden of establishing additional, individualized special programs for such students. They could participate in the regular programs, including remedial classes offered for all students.

The OCR letters show that several regional offices have developed complex requirements designed to place extra responsibilities on school systems to dissuade parents from withdrawing their children from bilingual and other alternative language programs. These include:

(1) requiring that school officials meet personally with parents on an ongoing basis to convince them that they should not withdraw their children from such programs;

(2) requiring school systems to prepare individual assistance plans for students whose parents have withdrawn them from the program, including bilingual education assistance, if the school deems it necessary;

(3) requiring school officials to establish elaborate procedures for monitoring schools in which 5 percent or more of LEP students are withdrawn from the program by their parents; and

(4) requiring that school systems set up special opportunities for parents to visit the schools and observe the bilingual and other programs in an effort to convince them to change their minds.

Below are quotes from several OCR letters that discuss these matters.

Excerpt 43: OCR requires an Arizona school district to develop Education-Individual Education Plans (ED-IEP) for LEP students whose parents have refused placement in the bilingual program. This should not be confused with the IEP requirement for students with disabilities under Section 504 and the Education for the Handicapped Act. There is no ED-

IEP requirement in OCR's *Lau* policies. (The letter and Corrective Action Plan totaled 54 pages.)

When parents refuse placement in one of the established programs for limited English proficient students, the student's classroom teacher will develop and implement an ED-IEP within 30 days. The classroom teacher will receive support from a Bilingual Education Curriculum Specialist . . . in determining the individual language needs and academic goals for the student and will assist the teacher in the development of the ED-IEP. ED-IEPs will be reviewed annually for student evaluation and progress, and documented by the classroom teacher.

(Letter dated May 31, 1996 to the Tucson, AZ USD #1, Agreement for Corrective Action, p. 49)

Excerpt 44: OCR staff are unwilling to accept the fact that many Hispanic and other parents of language minority students do not want their children taught in bilingual education programs. Thus, the blame for the parental withdrawals is placed on local school officials. (The letter and corrective action plan totaled 67 pages.)

During the 1994-95 school year, the FWISD identified 930 additional LEP students who were not placed in an alternative language program due to parental denial of permission for placement. The high number of parental denials at certain schools indicates a lack of support from some campus principals. Interviews with staff members revealed that, although the SPC had established procedures for informing parents of the benefits of the alternative language program in order to ensure an informed consent, most of the denials occurred at the campus level (e.g., school staff members solicited or recommended a parent or guardian's refusal to place their LEP child into an alternative language program).

(Letter dated August 1, 1996 to the Fort Worth, TX Independent School District, pp. 5 and 6)

Excerpt 45: OCR requires Fort Worth (and several other districts) to establish the elaborate and extremely burdensome procedures described below. The agency presented no firm evidence in support of statements that campus staff were recommending to parents that they refuse placement for their children into the alternative language programs. OCR imposes

aggressive and excessive requirements on districts to continually "sell" language programs to parents.

(OCR requires an additional meeting with parents who have denied placement of their children in bilingual or ESL programs)

By August 30, 1996, the FWISD will contact the parent/guardian of each of the (930) students who are not being served by either an ESL or bilingual program because of parental denials of participation in such programs. ***The District will provide the parent with another opportunity to place his/her child in bilingual education or ESL****. The procedures used will include the provision of information to the parent about the results of the assessment of the child for such services; the benefits of the program to the child; and the achievement of the child, to date, without the benefits of the program. A meeting will be held with the parent, in a language he/she understands, to explain and discuss the benefits of the programs.*

(OCR requires the District to establish a standing committee of parents to visit schools and hold meetings with parents who have refused placement of their children in the District's programs for LEP students)

In order to increase the positive public perception of its alternative language program*, by the beginning of the Fall 1996 semester, and annually thereafter,* ***the FWISD's bilingual coordinator will identify a district-wide committee of parents of LEP students*** *participating in the District's bilingual, ESL and Title I programs.* ***This committee will go to schools and hold group meetings with parents who have denied their children's placement in the alternative language program****. Parents who are unable to attend will receive a letter outlining points discussed in the meeting as well as a flyer regarding the available alternative language programs . . . By January 30, 1997, the District will provide to OCR a narrative description of the above efforts.*

(OCR appears to be requiring the District to develop information leaflets to persuade parents who have been unwilling to assign their students to the bilingual or ESL programs)

The Bilingual Education Director will develop and produce a flyer, in Spanish and English, describing the FWISD's alternative

language programs, their success rate, disadvantages for LEP students who do not participate in the program (e.g., higher dropout rates), and success stories of former LEP students. The flyers will be distributed to school sites so that they can be shared with parents . . . By January 30, 1997, the District will provide OCR a copy of the flyer.

(OCR continues to add to the requirements the District must meet in promoting its LEP programs to parents)

District-selected school campus principals will hold open houses or parent conferences to which parents of LEP students District-wide will be invited to observe a bilingual or ESL classroom. Instructors will explain various activities and demonstrate available classrooms . . . (By January 30, 1997, the District will provide to OCR a summary report of its actions.)

(OCR requires detailed reporting requirements on the District's efforts to convince parents to permit their children to participate in the bilingual or ESL program)

By January 30, 1997, the FWISD will submit to OCR documentation of the number of contacts made and consultations held with parents of the LEP students identified and whose parents denied participation in the alternative language program, and the number of LEP students participating in alternative language programs as a result of the above efforts. The District will also submit the results of its assessments of impediments to participation, steps already taken to address those impediments and dates and times when further steps will be taken, if necessary, to remove impediments to participation …

The District will describe how it will meet the English-language acquisition and other academic needs of LEP students whose parents or guardians refuse placement in formal alternative language programs.

(OCR requires detailed individual education plans for students whose parents have refused the services, including instruction in the native language. OCR also requires additional parental meetings and assessment processes. Such procedures place extra burdens on a school that is simply responding to parental wishes for schooling that moves the children speedily into the English language)

At the beginning of each academic year, the FWISD will identify appropriate support services, on an individual basis, for those LEP students whose parents deny participation in the alternative language program. Instructional staff persons (LPAC[Local Parental Advisory Council]; including at least one licensed teacher who is fully-endorsed in bilingual education or ESL) will develop an individualized language development plan for any LEP student whose parents refuse placement in the alternative language program. Each individualized plan will include a summary of the student's language and academic needs, measurable goals, and specific instructional strategies. The services to be provided will include English language development by a licensed teacher. The plan will be shared with each of the student's content area teachers. ***Support services in the student's native language will be provided where appropriate and necessary ...***

District officials will advise parents of the services listed in the individualized language development plan at a parental conference. Further, the FWISD will monitor the academic progress of these students every grading period, and will modify the support services as appropriate. ***If a student is not achieving academically at the end of the academic year, the FWISD will reassess the student to determine whether that underachievement is caused by limited English proficiency and, if so, inform the parent or guardian of this finding and provide a further opportunity of participation in the BE or ESL program*** *. . . By November 30, 1996, the District will detail the process that will be followed in monitoring and annually assessing the achievement of these children. The District will provide examples of this process. By June 30, 1997, the District will submit to OCR documentation that this monitoring occurred.*

(Letter dated August 1, 1996 to the Fort Worth, TX ISD, attached Agreement for Corrective Action, pp. 5, 6, 7, 8, and 9) (emphasis added)

Excerpt 46: OCR informs another Texas school district that it must override parental requests that their children not participate in alternative language programs (e.g., bilingual education). Further, the district schools are required to monitor the reasons for parental withdrawals that exceed 5% of the LEP population, to keep detailed records and reports for OCR, and to set up elaborate procedures to persuade parents to change their minds.

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All staff persons on LPAC's and site administrators will be informed that they shall inform and encourage parents of the benefits resulting from participation in the alternative language program.

The LPAC shall place all LEP students in the appropriate alternative language program. Notification of the placement and benefits derived from participation in the alternative language program will be provided to each LEP student's parent. ***A student may be removed from the alternative language program upon written parental request, i.e. , denial school form, however, appropriate and effective alternative language services must be readily available and provided to LEP students needing such services in spite of parental denial.***

All school sites will annually report to the District's Office of Bilingual Education the number of students whose parent denied participation in the alternative language program . . . ***A 5% (or higher) denial rate of the site's LEP student enrollment will automatically trigger a Superintendent or Office of Bilingual Education audit to determine the reason(s) for the high denial rate. By January 30 of school years 1998 and 1999 the District will have on record for OCR review:***

- ***Each school site's percentage rate of parental denials; and***
- ***A summary of the audits performed regarding the above, along with corresponding corrective actions.***

By January 30, 1998, the CCISD will have on record for OCR review documentation of the number of contacts made and conferences held with parents of LEP students identified and whose parents denied participation in the alternative language program, and the number of LEP students participating in alternative language programs as a result of the above efforts. The District will also have on record the results of its assessments of impediments to participation, steps already taken to address those impediments and dates and times when further steps will be taken, if the District deems necessary, to remove impediments to participation.

The District will describe how it will meet the English-language acquisition and other academic needs of LEP students whose parents or guardians deny participation in formal alternative

language programs . . . Support services in the student's native language may be provided where appropriate and necessary.

[Contains a laundry list of requirements similar to Fort Worth above, only more.]

(Letter dated April 25, 1997 to the Corpus Christi, TX Independent School District, attached Services Delivery Program for Language Minority Children, pp. 5, 6, 7, 8, and 9) (emphasis added)

Excerpt 47: This is an example of the OCR "parental withdrawal" requirement as applied by the Chicago OCR office. The list of requirements is substantially shorter than those imposed by the Dallas and Denver offices. Further, as noted in Excerpt 48 below, most other OCR offices imposed no such requirements.

The Corporation will develop and implement procedures for ensuring that students whose parents refuse consent for placement in the bilingual program continue to participate meaningfully in the general education program. The Corporation will ensure that counselors, principals, or the appropriate designated staff are informed that the students were eligible for placement in the program but opted out. In addition, the procedures should provide a means of tracking such student's progress, contacting their parents again, and offering language assistance services if performance is below grade level.

(Letter dated May 17, 1996 to the Gary, IN Community School Corp., attached Action Plan, p. 3)

Excerpt 48: The following quotes from various OCR letters demonstrate how other regional offices dealt with the issue of parents of LEP students refusing their children's placement into alternative language programs. These approaches are much less restrictive than those occurring in Dallas, Denver, and Chicago. (As indicated below, Chicago was not consistent in its requirements on this issue.)

In its response to OCR's data request, the District informed OCR that it was not serving 260 LEP students due to changes in demographics, the constant mobility of students, parental refusal of programs, and transportation to different centers and the restructuring of programs in the system. ***Of these students, 62***

were receiving no services because their parents had refused language assistance services . . .

The parental denial issue was not pursued by OCR in the letter or the attached voluntary agreement.

(Letter dated August 16, 1996 to the Waterbury, CT Public Schools, pp. 6 and 7.) (emphasis added)

The District will investigate and implement ways of increasing parental and community involvement in the District's ESL program. The District will investigate promising practices in use elsewhere and develop a plan for achieving parental and family involvement with the District.

(Letter dated June 27, 1997 to the Indianapolis , IN Public Schools, attached Action Plan, p. 10)

At the beginning of each school year, the District will hold a meeting for all language minority parents, and introduce them to the alternative language program staff. The purpose of the meeting will be to inform them of the availability of the alternative language program, the benefits of the program, and the rights and responsibilities of parents, including opportunities for parental involvement.

(Letter dated Nov. 13, 1997 to the Avon Grove, PA School District, attached Partnership Agreement, p. 7)

Excerpt 49: This example of how the Boston OCR office dealt with a situation in which parental denials for placement of LEP children essentially removed the children from all ESL services is in stark contrast to how such issues were handled in the Dallas, Denver, and Chicago offices. It is consistent with OCR's practices in handling the issue before 1993.

While reviewing a random sample of twenty cumulative files of Asian students currently attending North Quincy High School (NQHS), OCR found six students who were recommended for continued ESL services at the time of their graduation from Atlantic Middle School and who did not receive them because they chose to attend NQHS, where ESL services were unavailable. Only one parent provided written notice to the District indicating that she wished her son to enroll at NQHS even though she knew that this meant he would receive no ESL services. This parent indicated

that she understood that the District recommended continuation of ESL services but that she disagreed with the recommendation . . . We agree that contacting parents personally and discussing their decisions is preferable to simply asking them to return a form, and we are comfortable with this approach as long as there is some documentation, in the student's file or elsewhere . . . ***Our major interest is making sure that both parents and students make an informed decision, fully aware that if LEP students choose to attend NQHS, they will not receive the ESL services that the District considers to be critical to their success.***

We are also concerned about LEP students who waive TBE or ESL services and therefore receive no alternative language services. We saw evidence that the District follows up and attempts to persuade parents to change their minds if such students have such significant academic difficulties that they end up being referred for a special education evaluation.

(Letter dated September 30, 1997 to the Quincy, MA Public Schools, pp. 5 and 6) (emphasis added)

Unreasonable Reassessment and Exiting Procedures

OCR's civil rights policies for English language learners have always been premised on the assumption that school systems would periodically reassess students' English language skills and exit students from bilingual education or ESL classes when they reached a certain level of English language proficiency. The May 25, 1970 Memorandum cautioned against continuing placements of national origin students in programs that operated as "dead end" tracks. The September 1991 policy attempted to establish standards for determining when an English language learner would be eligible for exiting from alternative language programs. The policy cited the following factors for determining whether formerly LEP students are able to participate meaningfully in the regular educational program:

(1) whether they are able to keep up with their non-LEP peers in the regular educational program;
(2) whether they are able to participate successfully in essentially all aspects of the school's curriculum with the use of simplified English materials; and
(3) whether their retention-in-grade and dropout rates are similar to those of their non-LEP peers.

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The 1991 policy states, "Generally, a recipient will have wide latitude in determining criteria for exiting students from an alternative language program, but there are a few basic standards that should be met." These standards are listed in the policy document as:

- *Exit criteria should be based on objective standards, such as standardized test scores, and the district should be able to explain why it has decided that students meeting those standards will be able to participate meaningfully in the regular classroom;*
- *Students should not be exited from the LEP program unless they can read, write, and comprehend English well enough to participate meaningfully in the recipient's program. Exit criteria that simply test a student's oral language skills are inadequate.*
- *Alternative language programs cannot be "dead end" tracks to segregate national origin minority students.*

As is often the case with federal guidelines, the "few basic standards" listed above have been interpreted in ways that take away the "wide latitude" that school systems were promised earlier. In fact, OCR's mindless interpretation of the standards has had the effect of inappropriately extending LEP students' participation in alternative language programs. Several regional offices are requiring that LEP students remain in special programs until they achieve a specified percentile score (e.g., the 40th percentile) on standardized tests, and that they reach the prescribed level in reading, writing, and other subject areas. This is certainly a worthy goal, but it should not be a federal requirement, much less a requirement for achieving civil rights equity, because it does not consider the many variables that affect student performance (e.g., parental income and education, individual learner initiative and ability). It also completely ignores the fact that many *native* English speakers have educational deficits in reading and writing English. For example, if the 40th percentile on a standardized test is the norm, *by definition at least 40 percent of all students who take the test will not meet that norm.* To make matters worse, many OCR offices interpret the requirements in a way that excludes teacher judgments from consideration, eliminating an important source of information.

During the *Lau Remedies* period, most school systems implemented transitional bilingual education (TBE) programs in which English language learners were introduced quickly to English and transferred to all-English instruction within one to two

years. If they were deficient in other subject areas when they exited, they received remedial assistance in English along with other students. Since that time, significant changes have taken place in bilingual education programs. Bilingual advocates, who had frequently criticized TBE programs as inadequate, succeeded in moving many local and state programs away from TBE to long-term dual language or developmental bilingual education models. This new wave of bilingual programs was supported in large part through funds from the Department of Education's Office for Bilingual Education and Minority Language Affairs (OBEMLA) and education agencies in states with political support for bilingual education. Under these models, learning English was given a low priority. LEP students would speak mostly Spanish or another language for the first few years and be introduced to English very gradually. **6**

Thus, the exit criteria that OCR adopted in its 1991 policy were essentially the criteria developed by bilingual advocates and imbedded in the OBEMLA regulations. OCR, in attempting to provide more specific standards, found itself issuing exit criteria that de-emphasized English language instruction for LEP students locked into multi-year bilingual programs and contributed to their segregation from English speaking students.

A recent example of this occurred in OCR's and DOJ's current case against the Denver Public Schools. In a letter to Denver in July 1997, OCR used exit criteria as one basis for finding the District in non-compliance with Title VI and referring the case to DOJ for enforcement. The Denver Public Schools allegedly followed a practice of exiting students from bilingual classes within two to three years, once they learned to speak English well enough to understand classroom instruction. Applying its policy guidelines with literal strictness, OCR insisted that students must remain in the bilingual classes until they also became fully proficient in reading and writing English. Rita Montero was the parent of a student in the Denver Public Schools. She had been a strong supporter of bilingual education until her son was assigned for years to inferior "native language" instruction classes. When she could not persuade Denver school officials to remove her son from the classes, she ran for the school board, and is now serves on the Denver School Board. In that capacity, she led a much-needed reform of the District's bilingual program until OCR and DOJ became involved. OCR would not budge on its rigid interpretation of the exit criteria requirements; that is, teacher judgments were not to be considered. Thus, the dispute continues.

Below are excerpts from OCR letters to school systems that illustrate the agency's application of its exit criteria policies. They also record OCR's inconsistent application of policy.

Excerpt 50: The Denver office advises a Colorado school district of the exit criteria that will be acceptable to OCR. The requirements are indicative of the exiting requirements found in a large number of OCR letters.

A description of the criteria that the District will use to determine when a LEP student has obtained sufficient proficiency in English to be reclassified as non-LEP or to exit the alternative language programs. At a minimum, these criteria will provide that:

a. The determination of English-language proficiency is based on objective standards, for which the District can explain why students meeting those standards will be able to participate meaningfully in the general curriculum;

b. Students exiting alternative language programs can read, write, speak, and comprehend English well enough to participate meaningfully in the general curriculum;

c. LEP students have a realistic opportunity to exit from alternative language program services based upon English proficiency gains;

d. The academic progress of students who exit from alternative language services is formally reviewed at least twice annually for two years, and that monitoring documentation is maintained; and

e. Appropriate and timely steps are taken to remediate language or academic deficiencies identified in students who exit from alternative language services . . .

(Letter dated June 21, 1996 to the Mesa Co. Valley SD #51, attached Corrective Action Plan, p. 5)

Excerpt 51: In the two quotes below from letters issued by the Kansas City OCR, the monitoring periods for students who exit LEP programs differ significantly—a Nebraska district is required to monitor former LEP students for one year, while a Kentucky district is required to do so for three years. Other OCR offices, including Denver, generally required a two-year monitoring period.

By October 1, 1997, the District will revise and strengthen its current exiting procedures by adopting written criteria that demonstrate appropriate levels of competency in oral, reading, and writing proficiency skills . . . The District will revise its procedures so that LEP students will exit the alternative language program when the students:

. . . Perform academically on grade level in oral language, reading, writing, mathematics and science, according to the criteria established by staff at a particular grade level or subject area . . . The District will develop and ***implement procedures for monitoring the academic progress of each former LEP student for a period of one year after exiting from the alternative language program*** *. . .*

(Letter dated July 16, 1997 to the South Sioux City, Nebraska Community Schools, pp. 4 and 5) (emphasis added)

The District will establish ***procedures for monitoring the academic progress of each former LEP student for a period of at least three years after the student exits the alternative language program.***

(Letter dated November 4, 1997 to the Jefferson County Public Schools, Louisville, KY, page 7)

Excerpt 52: This example from a letter to a New York school system appears to provide the system with much more flexibility than the letters issued by Denver and other OCR offices. There is no mention of standardized testing criteria or that students must be able to read and write English at a specified level. Note that the letter states a different standard from the "meaningful participation" standard specified in OCR's policy.

The District assures OCR that it will continue to implement the actions it has taken as a result of its recently completed self-evaluation of the criteria used in determining whether students should exit the alternative language program ***to ensure that students enter the regular educational program in a reasonable time frame with appropriate skills, knowledge and abilities to have an equivalent opportunity to participate and benefit from all regular education programs as do students who were not in LEP student programs.***

(Letter dated November 26, 1997 to the Brentwood Union, NY Free School District, attached Resolution Agreement, p. 10) (emphasis added)

Excerpt 53: The example below taken from a letter issued by the Boston office to a Connecticut school system also provides much greater flexibility regarding exit criteria than is allowed by most OCR offices, by permitting the district to document why standardized testing may be inappropriate for individual students.

The District agrees to: Ensure that the District's exit criteria include the LAB (Language Assessment Battery) or the LAS RW (English literacy test) as one of the criteria for exiting ESOL (English for Speakers of Other Languages) students, ***or document for individual students the reason(s) that it was unnecessary to administer a standardized test before exiting.***

(Letter dated September 27, 1996 to the Stratford, CT Public Schools, attached Resolution Agreement. P. 3) (emphasis added)

Excerpt 54: This letter, issued by the Atlanta OCR office to a South Carolina school district, allows teacher judgments to be used as part of the exiting decision making process. The Atlanta office also requires monitoring for only one year after the student exits from the language program.

Multiple criteria will be used to determine a student's readiness to exit the ESL program. Students should be considered for exit when they obtain a 4 on the Woodcock-Munoz Language Survey. Students at this level should demonstrate fluent cognitive-academic language proficiency . . . Students should have a C or better average in mainstream classes without extensive modification. Teacher's evaluations, mainstream and ESL, should indicate that the child is capable of functioning in the mainstream . . . The English as a second language teacher and school principal or his or her designee will be responsible for monitoring the progress of former LEP students their first year out of ESL . . .

(Letter dated August 23, 1996 to the Beaufort, SC Public Schools, attached Title VI Compliance Agreement, p. 9)

Excerpt 55: This final example on exiting issues involving a California school system foreshadows some of the problems

that led to the passage of Proposition 227 few students exited bilingual programs, or exited long after they met the criteria.

At Milpitas High, no students had been redesignated during the 1996-97 academic year, although several appeared ready for a referral for redesignation . . . The site expected to complete the redesignation process for several students by the beginning of the 1997-98 academic year. OCR observed a similar delay occurring for some students at Randall Elementary. Even though a high number of students were redesignated at this site during 1996-97, some of these students appeared to have met the criteria for a number of months before they were actually redesignated.

(Letter dated November 3, 1997 to the Milpitas, CA Unified School District, p. 4)

Inappropriate Scrutiny of Special Education Programs

OCR's policy documents provide little guidance on the issue of special education, except to caution against assigning language-minority students to such classes on the basis of criteria that essentially measure English language skills. OCR regional offices have the option of investigating special education programs when conducting *Lau* compliance reviews. Investigating the placement of students into special education and teaching special education classes obviously requires special training and skills. Because of this, some OCR regional offices avoid investigating special education programs; others, however, have no reservations about their lack of expertise, and routinely investigate these programs, then require a range of corrective actions.

Excerpt 56: OCR's letter to a Massachusetts school district provides examples of OCR's intervention in and second-guessing of special education decision making. The following excerpt from the letter examines whether the District considered the native language and culture of Hispanic LEP students in the assessment process. Typically, OCR assumes deficiencies in the process without showing that any individual students were mis-assigned. As for OCR detecting a lack of clarity in the minds of the school's staff . . .

OCR also found that when the District assesses the need of Hispanic LEP students for special education services it fails to consistently consider the native language and culture of the student being assessed . . . ***While OCR found that a District staff***

member had conducted and published research regarding the interface of language and special education needs, and had even conducted some training on the subject for certain District personnel, the issue was unclear in the mind of many staff interviewed by OCR.

(Letter dated September 20, 1996 to Southbridge, MA Public Schools , p. 10) (emphasis added)

Excerpt 57: OCR adds to the Massachusetts District's list of transgressions: staff not paying attention to cultural issues, decision makers not being Hispanic, and the District presenting optional (instead of mandatory) diversity training for staff.

The OCR file review . . . indicated little evidence that consideration was afforded to the question of potential impact of cultural issues on the referral, evaluation and placement of Hispanic students. ***The investigation revealed that****, due to a paucity of Hispanic and bilingual staff, most . . .* ***decisions were made by non-Hispanic, English-speaking staff. Only a few of the teachers interviewed noted that they had participated in the diversity training which the District had previously offered as optional, not as mandatory training.***

(Letter dated September 20, 1996 to Southbridge, MA Public Schools , p. 11) (emphasis added)

Enforcing Quotas for Gifted and Talented Programs

OCR also has developed little policy guidance regarding the participation of LEP students in advanced programs, including programs for the gifted and talented. The 1991 policy states that "LEP students cannot be categorically excluded from gifted/talented or other specialized programs." Several OCR regional offices routinely conduct investigations to determine whether an appropriate number of LEP students are participating in such programs. While OCR never uses the word "quota," its investigative approaches and conclusions are a strong indication that the agency expects to see a proportionate number of LEP students in such programs.

The excerpts provided below from OCR letters give some idea of how the agency views this issue.

Excerpt 58: OCR's letter to a Massachusetts school district infers that the relatively low number of LEP students in the District's gifted and talented programs is a result of inappropriate screening in the English language.

While some LEP students are in the gifted and talented program, other qualified LEP students may have been screened out because the District uses a standardized test given in English as a screening device for entry into the program.

(Letter dated September 30, 1997 to the Quincy, MA Public Schools, p. 9)

Excerpt 59: In this Indiana case, OCR requires the district to change its criteria for gifted and talented programs in the hope that the new criteria will increase LEP participation. As is often the case, LEP students are not tested in English, and the district is asked to waive the English-language test requirement.

By August 1, 1996, the District will revise its current procedures to ensure that the application and selection process for its gifted program does not rely solely on student achievement tests conducted in the English language. Since LEP students are exempted from standardized testing, a waiver of the standardized test scores or alternative criterion for admittance will be allowed in those programs relying upon standardized test scores to gauge eligibility . . .

(Letter dated May 8, 1996 to the School City of East Chicago, IN, attached Voluntary Action Plan, p. 6)

Burdensome Evaluation and Reporting Requirements

OCR's 1991 policy states that "If a recipient does not periodically evaluate or modify its programs, as appropriate, it is in violation of the Title VI regulation unless its program is successful." The policy, however, provides little guidance to school systems on the types of evaluations that OCR considers to be acceptable, and what was provided has been misconstrued by OCR over the past few years.

Under OCR's perverse standards (i.e., other-language instruction for LEP students before English instruction), the agency is unable to find a "successful" program and routinely places substantial and

highly burdensome requirements on school systems to evaluate their programs and report the results. What is the justification for this bureaucratic excess? OCR bases its judgments on assumptions of questionable legitimacy, then forces districts to produce mountains of paperwork whose only value may be perpetuating federal employment.

The standards that OCR applies to school districts in the area of evaluations (e.g., longitudinal studies) for bilingual and ESL programs exceed the requirements that most schools (and states) have for evaluating their regular programs. OCR's evaluation standards have not been widely promulgated, and schools are generally not aware of the requirements until confronted with an OCR investigation. The evaluations are expensive to conduct, require substantial technical expertise, and may or may not provide useful information. Here, as in other areas of OCR operations, there is evidence of a highly selective application of the civil rights policies.

Excerpt 60: The lengthy quotes below from the Cleveland OCR office to a Michigan school system illustrate the level of detail and extent of requirements. Cleveland OCR initiated the notion (now adopted by other regions) of requiring school systems to conduct longitudinal studies of student performance. Such studies should be conducted and interpreted only by persons with expert knowledge of statistics.

By June 30, 1996, the District will prepare and submit a list to OCR composed of a representative sample of all students then receiving services in the District's alternative language program (the baseline group). ***This list will include the name, school, grade, home language, and alternative program of each student. The methodology used to select the representative sample must be validated by a qualified statistician and must accurately reflect all grade levels and all language proficiency categories of all language groups represented in the District . . .***

By June 30, 1996, the District will develop and submit to OCR the methodology and criteria ***to be utilized in a longitudinal study of the baseline group comparing the baseline group to non-limited English-proficient students. These criteria will include grades, retention, drop-outs, transfers out of the District, graduation status, test scores, endorsed diploma status, attendance patterns, and teacher/parent/student input.***

By the third Friday in July 1997, and by the third Friday in July every school year thereafter through the 2000-01 school year, the District will provide OCR with a written evaluation of all aspects of the District's alternative program . . ., including all deficiencies identified and remedies proposed or initiated. ***Prior to submission to OCR, the evaluation will be submitted to a wide range of community members for review and comment and will fully reflect the comments elicited as a result of the review by community members.***

(Letter dated June 19, 1996 to the Southfield Public Schools, Ferndale, MI, attached Partnership Agreement, p. 3) (emphasis added)

Excerpt 61: In the example below, the Dallas OCR found that the Corpus Christi school district had conducted an evaluation of its program for English language learners, but found the rather impressive evaluation efforts to be insufficient, dismissing them as a "good faith" effort. School districts should not be held accountable to meet the detailed standards described below, which have not been appropriately promulgated.

The Texas Plan requires all districts to conduct a periodic assessment of all required BE or ESL programs to determine program impact and student outcomes in all subject areas . . . The CCISD evaluated its alternative language programs for the 1994-95 and 1995-96 school years. These evaluation reports stated the District's goals and initiatives for the BE/ESL programs . . . ***The District also reviewed student data and proceeded to define the instructional services, programs, staff development, and methodologies used in the ALP (Alternative Language Program).***

The evaluation report findings' section contained quantitative student data comparing elementary LEP with secondary LEP student achievement *. . . The evaluation did not compare non-LEP with LEP students and furthermore, it used different comparison cohorts from year to year. This yearly data does not necessarily reflect the progress or lack of progress that a particular LEP cohort has obtained from its participation in the ALP. To obtain this information, a longitudinal comparison between LEP students participating in the program and LEP students not participating in the ALP over a period of time is needed. Also needed is the longitudinal comparison of the same LEP and non-LEP cohorts as they progress through the school system.*

In summary, the District's efforts to evaluate its ALP is recognized as a good faith effort. Concerns regarding the District's ALP evaluation remain because the District does not appear to adequately assess the longitudinal progress or lack of progress of LEP students. *Concerns that there have been limited modifications to the ALP resulting from these evaluations remain because the existing evaluations have not adequately measured the ALP's direct impact on the limited English proficient students.* ***Consequently, the District will not ensure that it is providing an equal educational opportunity to LEP children until it evaluates its program properly, and addresses its deficiencies accordingly.***

(Letter dated April 25, 1997 to the Corpus Christi, TX Independent School District, pp. 24 and 25) (emphasis added)

Excerpt 62: The example below from the San Francisco office requires the school system to demonstrate that any gains by LEP students are "attributable to the District program." OCR will not be satisfied that an LEP student demonstrates success: the school must demonstrate a "negative positive;" i.e., that the success did not result from another source.

The evaluation plan will address the following questions:

b. Are LEP students narrowing the gap in English academic proficiency in a way that is attributable to the District program?

(Letter dated May 16, 1997 to the Monterrey Peninsula, CA Unified School District, attached Resolution Plan, p. 2) (emphasis added)

Excerpt 63: In another California case, the San Francisco staff continue to insist that LEP gains be identified "based on their participation in the alternative language program."

. . . The District will create a system of evaluating student progress in each grade-level core content area, ***and will identify discrete outcomes expected of these students which are based on their participation in the alternative language program.***

(Letter dated November 3, 1997 to the Milpitas, CA Unified School District, attached Voluntary Resolution Plan, p. 3) (emphasis added)

Excerpt 64: The example below illustrates how hard OCR is to please. In this case, the Denver office rejects a Colorado school system's evaluation efforts because "the District has not developed a formal instrument, methods, or procedures for evaluating the effectiveness of its ESL program." OCR completely disregards the changes and improvements carried out by the District as a result of its evaluation, and again makes an artificial requirement that is not supported by policy or law.

The District reported that even though there is not a formal method of program evaluation, ***every year the ESL program is evaluated based on principal/teacher/parent input and the number of students served in the program. Modifications which have been made to the ESL program include: changing ESL school sites; updating the ESL curriculum guide; expanding efforts to recruit bilingual staff; providing staff development and inservice training district-wide; and applying "Equity Goals" in curriculum development . . . OCR determined that the District has not developed a formal assessment instrument, methods, or procedures for evaluating the effectiveness of its ESL program.***

(Letter dated June 21, 1996 to the Mesa County Valley, CO School District #1, pp. 20 and 21) (Emphasis added.)

RECOMMENDATIONS

OCR's enforcement policies affect thousands of school systems across the nation, and the application of policy by OCR staff strongly influences educational decisions and spending priorities. Yet these policies have never been openly debated in a national forum, nor has OCR considered a range of opinions on the many issues that emerge in this area. A federal civil rights enforcement agency should not act as an advocate for particular curricular or program methodologies and practices and should certainly not do so on behalf of a particular constituency.

For many obvious reasons, LEP students need to learn English quickly. Bilingual education, as it is practiced today, unnecessarily delays that goal and segregates students for years in separate classes. After more than 25 years of experimentation, the credible research does not show bilingual education to be an effective instructional method.7 OCR should not be allowed to turn a blind eye to the segregative effects of bilingual education or its pedagogical failures.

The agency must examine whether bilingual education in its current form should even be considered as meeting federal civil rights standards. Advocates of bilingual education now argue that it takes five to seven years before students in bilingual programs demonstrate significant gains. The situation in California provides the incontrovertible evidence of students who have been in bilingual programs for five years and more, were segregated in bilingual classes, and still do not speak English.

Setting aside the debate over the various methodologies for educating LEP students, it is clear that OCR's activities must be brought under control and that school systems must be informed of the specific standards they are expected to meet. The following recommendations will bring about needed reforms:

1. The Department of Education should adopt specific regulatory guidance that clarifies the civil rights requirements related to English language learners. The proposed guidance should be founded on the latest research. The agency should prohibit programs that result in the segregation of English language learners unless the research shows such programs are clearly superior to less segregative approaches.

2. The regulatory guidance should be published as a Notice of Proposed Rulemaking, with at least a 60-day comment period, and appropriate review of any regulations before they are issued.

3. As an alternative to current federal monitoring practices, states should be permitted to develop and monitor state-wide plans for educating English language learners within the parameters of the final regulation.

4. The Department should eliminate OBEMLA's discretionary grant making authority under Title VII and instead provide block grants to states for programs for English language learners. A portion of the funds should be used to support state enforcement of the civil rights regulations related to English language learners.

5. Only trained experts, preferably state education agency staff, should make judgments on issues pertaining to educational programs. OCR staff should be barred from making educational judgments.

ENDNOTES

1. Title VI covers issues of race, color, and national origin. Other major civil rights statutes enforced by OCR include: Title IX of the Education Amendments of 1972 (gender); Section 504 of the Rehabilitation Act of 1973 (disabilities); the Age Discrimination Act of 1974 (age, but not employment discrimination); and the Americans with Disabilities Act of 1991. When OCR finds discrimination, it must notify school systems of the violation and attempt to secure voluntary compliance. If school districts do not comply voluntarily, the agency can seek to cut off federal financial assistance through an administrative hearing process presided over by an impartial hearing judge.

2. In 1974, Congress also passed the Equal Educational Opportunities Act. Section 204(f) of that Act established a requirement that schools must provide equal educational opportunity for English language learners by providing them appropriate educational programs. However, the Act, which is enforced by the Department of Justice, did not specify what educational programs were deemed to be "appropriate."

3. Equality of access had been established as the goal for any program not as an immediate requirement.

4. The task force became bogged down for the first six months in negotiations with the Union over which staff members should participate and how they would be selected. The President's Executive Order in January 1993 gave government unions unprecedented powers to stall or block even the most straightforward management decisions. But that is the subject of another report.

5. With regard to programs for LEP students, it appears that no school district visited by OCR in the past few years has been found in compliance on this issue. Each has had to submit a lengthy compliance agreement that resulted in numerous changes in the district's priorities and programs.

6. The failure of these programs to teach students English fueled support from immigrant parents and other language minority parents for the successful passage in June 1998 of Proposition 227 in California.

7. Christine Rossell and Keith Baker, in their 1996 book, *Bilingual Education in Massachusetts: The Emperor Has No Clothes*, examined all credible, published studies on bilingual education and found English-immersion programs to be the most effective. They also found that in two-thirds of the bilingual programs, LEP students did no better than they would have if given no special assistance. Baker also stated in his July 15, 1998 declaration supporting California's Proposition 227: "After studying the research . . . there was no evidence that bilingual education programs were a particularly effective way of meeting the needs of LEP students . . . and there was no reason, based on demonstrated educational effectiveness, to prefer bilingual education programs to all-English special programs . . . ."

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CENTER FOR EQUAL OPPORTUNITY

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